No. 427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

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BLEED THROUGH

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APPELLEE'S BRIEF

Introduction

(1)

New York has, by its Constitution (Art. X, § 3, Appendix, p. 122) and by legislation which has had a long history, fostered the development of great public confidence in "savings banks," a distinctive type of State banking institution whose powers are constitutionally required to be uniform and whose investments are strictly regulated by statute (N. Y. Banking Law, § 235).[1] New

[1] In New York, savings bank investments are regarded as a standard of legal investments for the guidance of trustees generally. New York Personal Property Law, § 21 (e).

York's mutual savings banks are not permitted to engage in commercial banking (N. Y. Banking Law, Art. VI).[2]

To protect the public against deception, New York has, at least since 1858, enacted statutory provisions prohibiting persons, banks, *banking associations,* and institutions other than savings banks from advertising themselves as "savings banks." Since 1905, New York has deemed the use of the word "savings" to be misleading when used by non-savings banks (L. 1905, ch. 564). Since 1914, national banks have been specifically named (along with all other non-savings banks, including New York's own commercial banks, whose powers are substantially the same as national banks) among the banks by whom usage of the words "saving" or "savings" has been prohibited.

New York recognizes the power of national banks to engage in the business of receiving passbook-evidenced interest-bearing deposits. It does not believe, however, that Congress in 1927, by amending section 24 of the Federal Reserve Act, specifically to authorize national banks "to receive" savings deposits "as heretofore" authorized national banks to advertise in a manner which New York, at least since 1905 has regarded as misleading. The very terms of the amendment clearly indicated Congressional intention to have national banks continue to *conform* to their existing practices in the States of their location rather than to establish a national uniformity of practice. National bank practice in New York sustains our view.

We regard the preservation of the identity of our State banking institutions as an essential element of the con-

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[2] New York has traditionally set up special safeguards to protect the small depositors who have been encouraged to make deposits in mutual savings banks. *Mercantile National Bank* v. *New York,* 121 U. S. 138. Article VI of our Banking Law contains numerous provisions designed to give to mutual savings bank depositors special assurance of the safety of their deposits.

tinued maintenance of this Nation's dual banking system. We trust that the Court will not frustrate our efforts to maintain such identity, particularly since Congress has at no time seen fit to designate national banks as "savings banks." Federal Reserve Board Counsel, presented with a somewhat similar problem in 1915 by a California statute, conceded, at least (see Appellant's Brief, p. 45): "national banks should not be permitted to advertise themselves as 'Savings Banks' since they are not so designated in the [Federal Reserve] act."

Our position upon this appeal, therefore, is that the New York Court of Appeals has correctly held that while Congress has by section 24 of the Federal Reserve Act prescribed a kind of business that national banks may carry on (receiving "savings deposits"), our statute still interdicts the use in that business of certain non-essential words ("saving" or "savings") to avoid misleading our people into believing that commercial banks, like the defendant, are mutual savings banks (305 N. Y. 453, 460-461).

(2)

No Act of Congress purports to endow national banks with any power to advertise their business by words which contravene the standards of fair business dealing which prevail in a State in which the national bank is authorized to do business. We believe that it will, therefore, be unnecessary in this case for the Court to determine whether Congress has such power. At least until Congress has explicitly purported to grant national banks a privilege to violate safeguards against misleading advertising which a State applies to all other persons and forms of business organization doing business within its borders (including all of its own state-chartered commercial banks authorized to receive passbook-evidenced interest-bearing deposits), we do not believe that this Court will find that Congress

has granted national banks such an extraordinary privilege. Nor do we believe that the Court will conclude that, upon the present record, it has been shown that the proper functioning of the national banking system requires national banks to advertise in a misleading fashion.

(3)

New York has not sought and does not seek to prevent national banks doing business within its borders from competing *fairly* for depositors' funds. Indeed, we believe that this Court may judicially notice the fact that, while thus competing, national banks have reached a peak of their development in our State.

In New York, *the practice of national banks* other than the defendant[3] has been to employ words whose usage the State Banking Department and the Court of Appeals have not deemed misleading—such as "Special Interest Account," "Thrift Account" and "Compound Interest Account"—to induce depositors to maintain passbook-evidenced interest-bearing accounts with them (R. 61, 66-67), 301). In the Court of Appeals the defendant conceded that these terms were the other "words presently used by national banks" (Deft's Court of Appeals Brief, p. 21). The appellant still concedes (p. 71) that such has been the "practice * * * of commercial banks" in New York.

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[3] The appellant now (footnote 4, p. 13; and footnote 48, p. 95) claims that the Record is to the contrary. To prove this alleged error by the Court of Appeals, appellant desperately refers to a New York State Bank Examiner's Report relating to this case which shows that *on a single occasion one other national bank used the word "savings"*. The Court of Appeals finding, as to the virtually uniform practice of national banks in New York to refrain from using the prohibited words and to designate their interest-bearing accounts as such or as thrift accounts, is substantially correct. We do not believe this Court will disturb the Court of Appeals finding by reason of the trivial discrepancy which has been noted.

We believe that the *general banking practice* of national banks in New York, accurately to describe their passbook-evidenced *interest-bearing accounts* in the foregoing fashion is of vital significance in this case. We also regard as significant the failure of national banks generally to act in defiance of the New York statute, to have an exception placed in the statute in their favor or to procure express authority from Congress to advertise for "savings" accounts, especially since our statute has specified "national" banking associations since 1914 among the non-savings banks to which the prohibition applied.

We submit that this inaction and the *general practice of national banks* are vitally significant on the subjects of practical construction, Congressional intention and the necessity for national banks to use the prohibited words in order to perform their banking functions. They are entitled to far more weight than the *post litem motam* evidence developed for purposes of this suit by the defendant. *United States* v. *Rumely*, 345 U. S. 41.

Opinions Below

The opinion of the New York Supreme Court (R. 654) is reported in 200 Misc. 557. The opinions of the New York Appellate Division (R. 679) are reported in 281 App. Div. 757. The opinions of the New York Court of Appeals (R. 684) are reported in 305 N. Y. 453.

Statement

The defendant appeals from a judgment of the New York Court of Appeals dated July 14, 1953 that modified and affirmed, as modified, a judgment entered in the office of the Clerk of Nassau County on February 11, 1953, which, pursuant to an order of the Appellate Division of the New

York Supreme Court dated January 12, 1953, had reversed, on the law and the facts, a judgment of the New York Supreme Court, at Special Term, entered June 8, 1951, which had dismissed the complaint herein after trial.

As modified by the Court of Appeals, the judgment for the plaintiff restrains the defendant (R. 685, 690, 693, 695):

> "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public."

The State had sued to restrain the defendant, a national bank, from advertising in any manner or form or exposing any sign as a savings bank by the use of the term "saving" or "savings" or their equivalent and/or soliciting or receiving deposits as a savings bank in the State of New York; and from using the term "saving" or "savings" or their equivalent in the defendant's banking or financial business, in violation of subdivision one of Section 258 of the New York State Banking Law. The Trial Judge held the statutory provision to be unconstitutional and dismissed the complaint upon that ground. The Appellate Division reversed the Trial Court and held that the defendant had "failed to establish its defense of unconstitutionality." The Court of Appeals sustained the decision of the Appellate Division on the issue of constitutionality, but modified the terms of the injunction by striking therefrom a provision prohibiting the defendant from "soliciting or receiving deposits as a savings bank," since it found no evidence in the record that the defendant had violated or intended to violate the statutory prohibition against such solicitation or receipt (R. 690, 694).

The principal question presented by this appeal, therefore, concerns the constitutionality of the first subdivision of Section 258 of the New York Banking Law.

Section 258 of the New York Banking Law

Banking Law, Section 258, subdivision one, pursuant to which this suit was commenced, provides:

> "No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings', or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

As used in section 258, the term "savings bank" refers only to a "corporation organized or subject to the provisions of Article VI of the New York Banking Law (Banking Law, § 2, subd. 4).

This statutory provision, as we shall show, has the proper police power purpose of protecting the public from a particular type of misleading advertising. It is designed to prevent a use of words or advertising, by persons or banks *other than mutual savings banks* organized under the New York Banking Law, likely to mislead people into be-

lieving that they are dealing with such *banks*. The New York Court of Appeals and Legislature have found, that the use by commercial banks (State as well as national) in their business or their advertising, of the words "saving" or "savings" or their equivalent, is calculated so to mislead.

The Legislature has made the prohibition inapplicable to any "savings and loan association" (federal or state) presumably because it regards such usage as non-deceptive. Furthermore, such an exception appears to be required, as to federal savings and loan associations, by an express provision of a federal statute (12 U. S. C. A., § 1464) which authorizes the organization and incorporation of associations to be known as "Federal Savings and Loan Associations."

The Legislature has also permitted certain organizations *which do not accept savings deposits from the public*, but which are utilized by mutual savings institutions, to use the word "savings" in their names. Such usage presumably has also been found by the Legislature not to be of a character likely to deceive the public in the selection of an institution in which to place its savings. As to the powers of the Savings and Loan Bank, see New York Banking Law, Art. X-B; and as to savings-bank-owned trust companies, see New York Banking Law, § 235, subd. 18.

Section 24 of the Federal Reserve Act

Section 24 of the Federal Reserve Act (12 U. S. C. A., § 371) provides, in part:

> "Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed

the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located."

The Federal Reserve Board has, in exercise of the power granted to it by section 19 of the Federal Reserve Act (12 U. S. C. A., § 461) defined the term "savings deposits" in two of its Regulations ("D", dealing with "Reserves of Member Banks" and "Q", dealing with "Payment of Interest Deposits") simply to mean a deposit evidenced by a passbook, in respect to which the depositor is or may be required by the bank to give 30 days written notice of an intended withdrawal and as to which withdrawals are permitted in only two ways—upon presentation of the passbook, to the person presenting the pass book, or through payment to the depositor himself.

Although the deposits, so defined, bear some of the characteristics of savings deposits made in New York savings banks, the fact remains that the assets so deposited are not required to be segregated from demand deposits and are not subject to the same investment restrictions imposed by law upon New York savings banks.

"Savings deposits" made in a national bank are merely interest-bearing deposits evidenced by a passbook which are not subject to withdrawal on demand, forming part of a national bank's resources that are available even for unsecured personal or business loans.

Fairly interpreted (*Savage* v. *Jones,* 225 U. S. 501, 533-534), section 24, which authorizes the receipt of such deposits "hereafter as heretofore", contained no blanket authorization to national banks to use the words "saving" or "savings", even where such usage had been theretofore regarded as misleading or deceptive. And we know of no Constitutional principle which allow the words of a Congressional Act to be "quoted" in a misleading fashion.

The Pleadings

(1)

The complaint herein alleges that the defendant was and is a national banking association organized under the provisions of the National Banking Act (12 U. S. C. A., Sec. 21, *et seq.*) and authorized by its charter to transact the business of banking in the Village of Franklin Square, Nassau County, New York (Par. First, R. 3); and that defendant was never authorized or licensed to transact business as a savings bank in New York or to hold itself out to the public as such (Par. Third). The defendant admits that it is not a savings bank organized under the laws of the State of New York or authorized to represent itself as such (Answer, Par. Second, R. 6).

The complaint calls attention to the provision of subdivision one of Section 258 prohibiting the use of the word "saving" or "savings" in the banking or financial business of banks other than savings banks and savings and loan institutions and to the provision prohibiting any individual or corporation, other than a savings bank, from soliciting or receiving deposits as a savings bank (Par. 2). The answer sets forth the words of the statutory provision (Answer, Par. First).

The complaint alleged that since 1947, defendant had continued to use the term "saving" or "savings" in its banking, financial business and dealings with the public in this State (Par. Fourth). And, it further alleged that since 1947, defendant had solicited savings accounts by printed and exposed signs, circulars, stationery and varied and sundry advertising media, inclusive of newspapers, in and on which the defendant publicly advertised and circulated the word "saving" or "savings" (Par. Fifth). These allegations the defendant formally denied, but ad-

nittted that it had "used the term 'saving' or 'savings' in ts business" (Answer, Par. Third).

The complaint further alleged that the defendant's use of the words "saving" or "savings" was calculated to and had the tendency and effect of leading the public to believe that the defendant, contrary to fact, was incorporated as a "savings bank" with all of the attendant safeguards and benefits (Par. Sixth). This allegation the defendant denied (Answer, Par. Fourth).

It was then alleged that the defendant's use of the word "saving" or "savings" violated the provisions of subdivision one of Section 258 of the Banking Law (Complaint, Par. Seventh). This allegation, too, the defendant denied (Answer, Par. Fifth).

The complaint further alleged that, prior to commencement of this suit, the People had demanded that defendant terminate the use of the word "saving" or "savings" or their equivalent in its banking, financial business and dealings with the public in New York and exclude those words from its advertising matter circulated by it in the solicitation of business and deposits from the public in violation of the Statute, but that the defendant had refused to do so (Par. Eighth). The defendant admitted that prior to commencement of this suit, the People had demanded that defendant terminate the use of the words "saving" or "savings" in its advertising (Answer, Par. Sixth).

Prior to conclusion of the People's case, the complaint was amended to include an allegation (designated as Par. 8-A) to assert that by the acts complained of, the defendant had practiced fraud and deception on the public, by sign, representation and advertising for savings accounts, using the prohibited term "saving" or "savings", and in the use of the terms in its dealings with the public, the defendant not only committed a public nuisance but

usurped the rights and franchises reserved exclusively for savings banks and savings and loan associations authorized to do business as such (R. 86). This allegation the defendant denied (R. 86).[4]

The complaint concluded with an allegation that the People had no adequate remedy at law and a prayer for injunctive relief restraining the defendant from advertising or soliciting deposits as a "savings bank" or from using the term "saving" or "savings" or their equivalent in its banking, financial business and dealings with the public in New York. The complaint also contained a general prayer for such other and further relief as might seem proper to the Court (Par. Ninth and Prayer for Relief).

(2)

The answer set up as a complete defense the alleged unconstitutionality of subdivision one of Section 258 (R. 6-7). It alleged that defendant was a national banking association, which, in the course of its general banking business, accepted savings and other time deposits, as well as demand deposits (Par. Ninth); that in carrying on such business, it had placed various signs on its banking premises containing the word "savings" and had, from time to time, advertised the fact that it accepts sav-

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[4] This amendment, incorporating into the complaint the Third paragraph of the People's Bill of Particulars (R. 12-13), did not extend the State's position unduly. The right and franchise referred to is the right to be known as a "savings bank" or as a savings and loan institution. We do not contend that Section 258 accords State-organized savings institutions any monopoly over the receipt of *deposits* of the "savings" type (R. 438). It is our position that the section simply sets up a salutary safeguard, necessary and proper in the opinion of the Legislature, to prevent misleading advertising, calculated or likely to deceive members of the public into believing that an institution, not a mutual savings bank, is such a *bank*.

gs deposits (Tenth); that its activities had been duly pproved by the Comptroller of the Currency, the govern-ent administrative office charged by Federal statutes ith its supervision (Eleventh); that its activities are nd have been duly authorized and sanctioned by the ederal statutes relating to national banking associations ncluding, among others, 12 U. S. C. A. Sections 24, 371, 33-585 and 588-a, as well as regulations of the Board of overnors of the Federal Reserve System (Twelfth);[5] nat subdivision one of Section 258 of the New York anking Law, in so far as it purported to prohibit ational banks from accepting savings deposits or mak-ng use of the terms "saving" or "savings" is invalid ecause it: (a) conflicts with the Constitution and the aramount laws of the United States; (b) unduly inter-eres with and hinders the operation of federal instru-nentalities, namely, national banking associations located n New York State and frustrates the purposes for which ney were organized; and (c) unduly discriminates gainst national banking associations located in New York tate and handicaps them substantially in competition ith savings banks and savings and loan associations Fourteenth). Accordingly, defendant asked dismissal of ne complaint.

The Testimony

The testimony clearly established a violation by the efendant of the provisions of subdivision one of section 58 of the Banking Law. The defendant admitted, by its ounsel's opening and by the testimony of its president,

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[5] There is no proof in the record showing that the Comptroller f the Currency had approved *defendant's* activities. Nor has the ederal Reserve Board at any time adopted any *regulation* governing dvertising *by* national banks.

that it had used the words "saving" and "savings" in its banking business, in its signs and in its advertising. The People adduced documentary proof of this usage and photographs of defendant's premises to supplement that proof, showing the way in which defendant used the prohibited words in signs upon its premises.

The defendant sought refuge in testimony disclaiming any *intent* to mislead and offered proof that its premises had been constructed to look like a department store, rather than like any type of bank. And the record was swollen by the testimony offered by the defendant, by way of expert witnesses and a "sample poll", to show that the prohibited words "saving" and "savings" were better understood by residents of Nassau County than the phrases, "compound interest account", "special interest account" and "thrift account", which were generally used by commercial banks (state and federal) to advertise the interest-bearing thrift accounts maintained in such banks.

A. The Conclusive Proof of Defendant's Violation of the Statute.

(1)

At the very outset of the trial, defendant's counsel, after referring to the allegations of the complaint, conceded defendant's violation of section 258. Counsel stated (R. 17-18):

> The complaint * * * charges we have used the word 'savings' in, and in connection with our banking business, in or signs and advertising. There is no question about that. We have, we do, and we intend to continue to do so under what we claim is a Federal

grant of power unless and until prevented by action of this or some other Court of competent jurisdiction."

(2)

ARTHUR T. ROTH, president of the defendant, was examined before trial for the purpose of ascertaining the particulars of the defendant's violations of the statute. The People's bill of particulars of the defendant's violations (R. 8-13) was predicated largely upon Roth's testimony. Without objection, Roth's complete testimony was read into the record (R. 21-38).

Mr. Roth admitted the use of the prohibited words, in signs upon the bank's walls and on tellers' windows and identified numerous exhibits showing their use in the period between 1947 and 1950 in various advertising media including newspapers, direct mail, handbills and house-to-house solicitation (R. 22-35).

The defendant not only had a vice-president in charge of advertising and publicity, but it also used an advertising agency (R. 28, 30).

The aggressive nature of defendant's advertising is perhaps best illustrated by its enclosure in 15,000 envelopes, which it mailed, of a form of draft together with instructions for its use, upon which defendant advertised (People's Exh. 9K, R. 541):

> "We Will Transfer Your Savings Account from Another Bank."

Handbills circulated by defendant solicited "savings" accounts (Exh. 10A, B and C). About 15,000 of these were distributed in June 1948, by the Federal Distributing Corp. in the Franklin Square area (R. 29). The handbills were enclosed in a business reply envelope (Exh. 10A, R. 30) and were in the form of a letter, which offered

special incentives, including *"maximum dividends"*[6] to persons opening "savings" accounts at the bank prior to a specified date (Exh. 10B); and enclosed therewith was an "application slip" to be filled out by any person who wanted "to take advantage of all the special benefits of a Franklin Square Savings Account" (Exh. 10C). This application form also sought to induce and to facilitate the transfer of accounts from other banks (R. 543)

Defendant distributed about 6,000 copies of its 1948 annual report, in the form of a brochure (People's Exh. 11). In it, defendant advertised, alternately, "savings" and "thrift" accounts. Under the heading of "Savings", it stated that it had "Thrift Accounts"; then it showed a picture of its "New Thrift Wing", which it stated "handled Savings, Christmas Club and Children's Banking". The picture itself showed a sign several feet wide dominating the entire area—containing *not* the words "Thrift Accounts", but the single word "Savings." *Each of six tellers' windows bore a sign with the word "Savings"*, above the words "Christmas Club" (R. 556). The brochure also advertised an depicted a special "Children's Savings Window" (R. 560, 562). The defendant's president admitted that the "savings" signs had been on display since about July 1, 1947 (R. 32).

Deposit and withdrawal slips used in the "savings" department since 1947 had borne the designation "savings department" (People's Exhs. 13A and 13B).

Arthur Seaton, a bank examiner, testified (R. 38-84). Because it is conceded that the defendant violated the statute, we shall not summarize the portion of his testimony showing defendant's use of the prohibited words.

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[6] National banks are authorized to contract to pay "interest" on deposits, not "dividends". Mutual savings banks pay *dividends*, sometimes colloquially c "ed "interest" (R. 61-62, 287; N. Y. Banking Law, § 245).

Nor shall we summarize the portion of this witness' testimony directed toward showing the defendant's fraudulent *intent*, since it is our position that the New York Legislature and Courts have found that use of the prohibited words by non-savings banks is *per se* deceptive to the public. On that subject, for brevity, we simply call the Court's attention to the portion of the record in which he gave his testimony as to the details of his investigation (R. 38-57).

Except in the defendant's buildings, the witness had, in inspecting 3,000 to 4,000 banks, never seen a commercial bank teller's window with the legend "Savings" (R. 52). Tellers' windows in savings banks uniformly bear that legend (R. 53).

On "cross-examination", Seaton testified that most national banks, in advertising for interest-bearing accounts, used the words "Special Interest Deposits", "Thrift Accounts" and "Compound Interest Accounts" (R. 61). He knew of no prosecution by the State for the use of those terms (R. 67).[7] Savings banks and savings and loan associations used the words "Savings Accounts" in advertising (R. 61-62).

It was Seaton's opinion that the various phrases used by commercial banks, state and national, had the same value for advertising purposes as the prohibited words (R. 62-63). It will be noted that the bulk of the defendant's testimony was directed toward proving the contrary.

Francis J. Ludemann, a Deputy Superintendent of Banks, also testified for the People. His testimony was directed toward showing the various types of banking

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[7] The New York Courts have held that section 258 of the Banking Law does *not* prevent the usage of these synonymous terms commonly employed by national banks to designate their interest-bearing "savings-type" accounts (R. 682, 688-9).

institutions which function in New York, giving some of the history of these various types of institutions and distinguishing between the functions they perform (R. 279-346). These institutions include not only savings banks but commercial banks, savings and loan associations, credit unions and industrial banks (R. 281-286).

We do not believe that we need here detail the numerous differences shown by this witness' testimony between the various types of institutions, in their functions, the limitations upon their powers of investment and their powers to lend money, the maximum amounts of deposits receivable by them, their taxability or in their corporate structure. For present purposes, we believe it to be sufficient to call the Court's attention to the presence of this testimony in the record to offer factual support for the proposition that there are sufficient differences in the nature and functions of these institutions to justify a legislative exercise of discretion directed toward preserving their separate identities. As Mr. Ludemann testified (R. 281):

> "* * * New York has its own pattern of banking institutions, it is not identical with that of other States; it consists in a good part of institutions set up for special objects and restricted in their activities and in the character of assets they can invest in, to those objectives. In the type of financial institutions that take the funds of the public we have three main classes of institutions, we have commercial banks, we have mutual savings banks, we have savings and loan associations * * *."

He pointed out that savings bank history in New York began in 1819 (R. 284); and that although commercial banks had existed earlier, *it was not until this century that commercial banks had entered the field of "time deposits"* (R. 281-284). He also pointed out that mutual

savings banks were not common throughout the country, existing in only 17 of the 48 states, principally in the New England and Middle Atlantic States (R. 286).

Ludemann also pointed out that Franklin Square, where defendant is located, had no savings banks; but if a *savings* bank had existed there, it could have had no branches, as the defendant had, because it had a population of less than 30,000 (R. 291-292). He conceded that the Banking Department had no formal regulation dealing with the term "equivalent" as used in section 258 of the Banking Law (R. 293-295).[8] Special Term declined to accept proof from this witness that the Banking Department had *not* considered the use by national and state commercial banks of the terms "special interest account", "thrift account", and "compound interest account" as constituting a basis for prosecution (R. 295-297; cf. R. 301 as to the trade practice of using these terms).

On cross-examination, Mr. Ludemann pointed out that *savings and loan associations* take "investments" as distinguished from "deposits" (those institutions having "shareholders" rather than depositors). Ludemann's testimony indicated that savings and loan institutions *may* be misleading the public in advertising their "shares" as accounts, but he had not been present when a possible prosecution for such advertising had been discussed (R. 306-307). Personally, he did not consider the savings and loan advertising to be deceptive (R. 307). He conceded

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[8] The New York courts have construed the term "equivalent" not to encompass or prohibit the use of the synonymous expressions commonly used by national banks—such as "thrift account", "special interest account" and "compound interest account". We have no authoritative decision on the subject by a New York court, but it is quite possible that the word, as used in the statute, may be restricted to refer only to a *foreign language equivalent* and to words contrived to resemble the prohibited words phonetically or otherwise.

that savings and loan associations advertised higher returns on their shares than savings banks (R. 316-318). He conceded that these associations were, in a sense, in competition with savings banks and commercial banks for people's surplus money (R. 331-332).

Ludemann pointed out more of the distinctions between "passbook" accounts in savings banks and commercial institutions as follows (R. 338):

> "* * * in a savings bank you have a mutual institution * * * devoted exclusively really to serving savings accounts in passbook form; that is their one big stock in trade day in and day out, that is really the only public funds they can attract is in that form, and they have no other object, real one, than to keep the funds invested safely and to pay the maximum rate of distributable earnings that can be safely produced. In the commercial bank there is not a similar restriction around the assets to which the funds might be invested, there may or may not be the same continued interest in passbook accounts, and is the possible conflict of interest between the stockholders as between paying the highest rate can be safely produced or a rate they think is necessary to hold that type of business, and you have your background of history and tradition."

B. The Defendant's Case.

The defendant offered two types of proof to show that the words generally used by commercial banks to attract interest-bearing accounts ("special interest," "thrift" and "compound interest" accounts) were not as effective in attracting deposits as the words whose use section 258 prohibited, "saving" and "savings": (1) testimony of several national bank officers thereon; and (2) testimony

as to public understanding of the various terms used in bank advertising, as revealed by a so-called "sample poll".[9]

(1)

JOHN R. EVANS, president of the Poughkeepsie National Bank, competed with no savings banks in his area, where his competition came from five commercial banks and one savings and loan association (R. 99).

Special Term was persuaded by defendant's counsel to admit testimony to support his contention that national banks were seriously harmed because the word "savings" was the "only word" the public seems to understand (R. 102-104), a contention that completely overlooks the function which a well-conducted modern advertising campaign seems to be able to accomplish, even as to artificially contrived words or phrases, in almost any field of business. Special Term permitted the testimony, on the ground that national banks had the power to advertise (R. 103-104), but neglected to observe that the exercise of this power, like the powers of a national bank to make contracts and otherwise conduct its business, was to be exercised in conformity with the laws of the State in which the national bank was located.

Evans' bank used the words "interest accounts," but it was his opinion that the word "savings" had the "most attraction" and that they were "definitely handicapped" by not having the right to use the word (R. 104-105). But, despite this handicap, Evans admitted that accounts in the savings department of his bank had increased in the pre-

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[9] The defendant also offered testimony to show that its main banking structure was altered to look, not like a savings bank, but like a department store; but we shall not summarize that testimony (R. 87-97, Schoen; 114-134, Carlson; 405, Boyle; and 420-434, Roth); since it relates to the issue (now academic) of whether defendant otherwise "solicited or received deposits as a savings bank" and was directed only to elements of proof bearing upon defendant's *intention* to deceive.

ceding five years from seven to eleven million dollars (R. 105-106); and had yielded a fair return on its capital (R. 106). *During the past ten years, his bank had increased its profits more than three-fold* (R. 111); but he was of the opinion that the profits would have been greater if they had been permitted to use the word "savings" (R. 112).

Augustus B. Weller, president of the Meadowbrook National Bank, stated that the competition in Nassau County for deposits was "very intense" (R. 137). There are 49 banks in Nassau County, of which *only one is a savings bank,* the *Roslyn Savings Bank* (R. 136). *Commercial* banks, including national banks in Nassau County, compete with banks outside the county for deposits, but the competition is particularly extreme between *commercial* banks in the county and *savings and loan associations* (R. 139). Most savings and loan associations advertise extensively, but *savings banks not to as great an extent, except New York City savings banks,* which advertise intensively in Nassau (R. 139).

Evans regarded the words "thrift, specal interest or compound interest" as "futile in appealing to the public" (R. 140). He thought the word "savings" would attract many more depositors than the words "special interest account" used by his bank (R. 142).

Mr. Weller conceded, on cross examination, that *his bank did not use newspaper advertising,* to solicit special interest accounts, except incidentally, because he deemed it ineffective (R. 144). This admission is very significant, for it is exactly that sort of attitude that probably remains responsible for the public's lack of knowledge of the meaning of the terms used by commercial banks to designate their interest-bearing accounts. Circulars issued to the bank's commerical depositors also contained only incidental references to the "special interest" department (R. 145). Nevertheless, deposits in that department had increased

10% between 1948 and 1950, as compared to 20% in the bank's demand accounts (R. 146).

Mr. Weller also conceded that although his bank had some competition from the Roslyn Savings Bank, the only savings bank among 49 commercial banks in Nassau County, *the bank's real competition came from "New York City banks and savings and loan associations"* (R. 147). He also conceded that *national banks had prospered* during the preceding ten years, although perhaps not as much as savings banks (R. 147); and that in the last 15 years all banks have done well (R. 147). National banks in Nassau County did a very good business from 1945 to 1950 (R. 148).

Mr. Weller conceded that commercial banks made investments prohibited to savings banks (R. 148).

He further admitted that his bank was "a successful national bank" (R. 149); but contended that it would do more business if permitted to use the word "savings" (R. 149).

He further admitted that customers walked out on them and withdrew their deposits when they learned his bank did not really offer depositors a "savings institution" service (R. 152). The embarassment attendant upon explanations that the national banks' services were "the same thing" is evident in this testimony (R. 152).

> "Well, it is rather an awkward thing to explain, just what we do have.[10] Of course, we tell them we have the same thing as the savings department, although it is called a special interest department, we explain to them it is the same thing. When that is not carefully explained to them, however, they seem to feel they are

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[10] It would seem quite simple to explain that national banks *contract* to pay interest to their depositors, at a fixed rate. Indeed, the explanation would seem to be much easier than a mutual savings bank is required to make: That future savings bank dividends can only be estimated.

> not doing business with a savings account, and in fact, and we have withdrawals where people explain to us when we ask them why they are withdrawing their money, they decide they need to put the money in a savings institution; that we do not have that type of service."

"The same thing," of course, is exactly what the depositors do not receive, unless New York's constitutional and statutory distinctions between "savings banks" and all other types of banks are to be completely disregarded.

WILLIAM H. ABEL, president of the Central National Bank, testified that the competition for deposits was very keen; particularly since *savings and loan associations* had made vast strides in the preceding ten to twelve years (R. 154-155). He was of the opinion that of the words used *advertising* for deposits, the word "savings" was generally understood by the public, but that the "expressions commonly used in *commercial* banks" were not understood (R. 157).

Mr. Abel declined to state, however, that the expressions commonly used by commercial banks were "inadequate". He explained that the statute put them (*commercial banks*) under a hardship (R. 157). He admitted, on cross examination that between 1930 and 1950, his bank had built up a "savings" deposit business of $3,000,000, an amount almost equal to the bank's demand deposits of $3,400,000 (R. 161-162). *He also admitted that the statutory restriction,* even though burdensome, had not impeded the success of his bank (R. 164). Mostly, it was just *embarrassing* to explain their position (R. 164). While his bank had succeeded, savings and loan associations had grown tremendously (R. 165). *He acknowledged that some banks had not advertised for business* (648). About half the commercial banks in Nassau County were state banks, also subject to the statutory restriction (R. 166).

Mr. Abel's bank had conformed to the New York Banking Law provisions and had, nevertheless, made profits (R. 168).

JOHN J. KEUTHEN, president of the Wheatley Hills National Bank, stated he would testify like the preceding witnesses, except that his "savings" department had decreased since 1948 (R. 170). It was stipulated that if the presidents of two other national banks had been called, their opinion evidence would have been the same as that of the testifying witnesses, Abel, Weller and Evans, subject to no concession by the Attorney General as to the accuracy or correctness or admissibility of the opinions so given (R. 170-171).

The Attorney General moved to strike out the opinion evidence of all the national bank officers (R. 170). But Special Term accepted the testimony and attributed great weight to it (R. 657-659). The evidence, however, should have been given the small weight attributed to it by the Appellate Division and the Court of Appeals (R. 681, 688-689). For it is clear on the testimony that the restriction of the New York statute did not prevent any of the national banks affected from carrying on a profitable business.

At worst, New York's statutory regulation subjected them only to the inconvenience of making it clear to the public that they were not "savings banks," within the New York meaning of those words, but a different type of institution empowered under *different conditions* to receive interest-bearing deposits. Furthermore, there was nothing in this testimony to show that national banks had conducted any sort of adequate advertising campaign to educate the public as to the meaning of the expressions they used to designate interest-bearing accounts. On the contrary, the worthlessness of the opinions expressed was demonstrated by the factual evidence that some national banks did not even advertise for business and that others advertised their interest-bearing accounts only incidentally.

(2)

The great bulk of the defendant's testimony was directed toward showing, by means of a "sample poll," paid for by the defendant, that the public better understood the word "savings" than it understood the terms "thrift," "special interest" and "compound interest." The poll purported to test public knowledge and attitudes only in Nassau County, not in the entire State of New York (R. 266). Serious questions were presented as to the admissibility of and the weight to be given to this "sample poll." Special Term resolved all legal questions in favor of the survey and, unlike the Appellate Division and the Court of Appeals (R. 681; 688-689), attributed great significance to it (R. 659-664).[11] We shall here cover only certain aspects of this testimony, the significance of which Special Term misunderstood.

The poll was conducted under the supervision of Matthew Chappell, a Hofstra College professor of psychology. He employed students of the college in assembling answers to certain questions which he presented to a "sample" of the Nassau County population. While the evidence indicates that great care was taken to select the interviewees so that they would truly represent the knowledge and attitudes of the entire Nassau County adult population (R. 187-266; 274-277; 388-391; 395-401), there was a "tremendous variety of answers to the questions" (R. 351) and the accuracy of the poll depended upon the analysis of these answers made by a college instructor named Richard Brumbach, the poll's so-called "tabulator," who was permitted to (and did not hesitate to) testify that his "tabulation" was accurate (R. 350). Brumbach, incidentally, admitted that one of the purposes of the survey was

[11] See the unsuccessful motion to strike out this evidence, which is incorporated in the record and the authorities cited in support thereof by Assistant Attorney General Rollins (R. 504-528).

to ascertain *how far the public had been educated as to the meaning of the four terms used by various banks in advertising* (R. 364-365).

The poll made no attempt to test the background of the interviewee's knowledge. Nor did it attempt to ascertain what efforts had been made by commercial banks in the area surveyed to publicize the terms which they used in designating their interest-bearing accounts.[12] It was limited simply to public knowledge and preferences. Of course, those are but two of the factors in which a State legislative committee or a Congressional committee might be interested if it had before it for consideration the question of whether the protection of the public and standards of fair competition required the ban on the use of the words "saving" or "savings" to be continued or discontinued.

But we do not believe that we need here speculate on the various factors, including various types of comparative statistics, which might motivate the State Legislature or Congress to enact a statutory amendment. It would seem sufficient, for the present, to point out that a Court could not properly or effectively function in that legislative capacity.

The results of the survey, in any event, sustain the constitutionality of section 258, rather than the conclusion reached by Special Term. For while the survey showed that the public had a greater understanding of the mean-

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[12] No part of the survey was designed to test the effectiveness which a sustained modern advertising campaign would have in increasing the public's knowledge of the meaning of the terms ordinarily used by commercial banks—"special interest", "compound interest", "thrift." Defendant's witness, Brumbach, conceded that an advertising campaign could so educate the public (R. 370-371). Defendant's president made a similar admission (R. 489). And it should be remembered that the defendant was astute enough to have a vice-president in charge of *advertising* (R. 28, 407, *et seq.*).

ing of the word "savings" than it did of the terms used by commercial banks (R. 626), it also showed a public preference for using savings banks for the maintenance of "interest"-bearing accounts (R. 637-639). And, just as important, *it showed a widespread lack of knowledge on the part of the public as to the type of financial institutions which maintained the various* types of "interest"-bearing accounts (R. 629-630). The survey demonstrate that even today, many years after the enactment of section 258, a sufficient degree of public ignorance persists, so that New York's Legislature would be justified in now enacting legislation to protect this ill-informed public from a misleading use of the terms "saving" or "savings."

Indeed, the defendant, by its survey seems to have supplied evidentiary material in support of the New York Legislature's action, which would seem to render it unnecessary, since the evidence was accepted, to rest on the usual presumption that a factual basis exists for legislative action. Certainly, the evidence adduced by the defendant as to one phase of public ignorance would seem to warrant the assumption that the use of the word "savings" might mislead many of these ill-informed persons into assuming that a bank using the word was surrounded by all the statutory safeguards ordinarily associated in New York with mutual savings banks.

(3)

The defendant's own financial status belies its claim that section 258 has impaired its effectiveness. Even before 1947, when it began to violate section 258, defendant's deposits and assets had grown tremendously. Its total deposits grew from $490,264 in December, 1933, to $20,024,644 in December, 1945. Its "capital, surplus and undivided profits" grew from $123,437 in 1933 to $1,091,066 in 1945 (People's Exh. 36, R. 602A).

Defendant's interest-bearing deposits grew from 274,601 in 1941 to $10,085,748 in 1946, during a period en, presumably, it was observing the provisions of sec- n 258 (R. 649).[13]

(4)

Over objection, Special Term received in evidence a easury Department form on which the defendant was uired to report its financial condition to the Comp- ller of the Currency (R. 458-462; Exh. PP, R. 652A). e form contains a single item for "Interest on time de- sits (including savings deposits)." New York does not ggest that section 258 prevents the defendant from pre- ring such a report. And the New York Appellate Divi- n and Court of Appeals have held that section 258 is dressed to a bank's advertising to the *public* (R. 679, 4).

Nor do we suggest that defendant is prevented from lling or redeeming United States "savings" bonds, or vertising their sale (R. 344-345). Exhibits QQ, RR and S, which deal with the advertising of government bonds hich national banks are required to sell, as government gents (31 U. S. C. A., § 757c, subds. h and i and U. S. easury Regulations §§ 316.20d, 321.1, among others), ould have been excluded from evidence (R. 466, 469, 0). In any event, the New York statute has not been nstrued to prevent the conduct of such *government siness* (R. 682).

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[13] Prior to the commencement of this suit, the defendant in 1950 ded three branches to its main bank—one at Elmont, another at evittown and the third at Rockville Centre; the last by merging with state bank that had been the South Shore Trust Company of Rock- lle Centre (R. 433-435). We need not here speculate on the extent the impetus given to defendant's growth by its misleading use of e term "savings" at its main office since 1947 and at its branches ereafter; nor upon the reason why in 1949 and 1950, after defend- nt had commenced its violation of the statute, its *demand* deposits gan to exceed its "savings" deposits (R. 436, 649).

Analysis of the Opinions of the New York Courts

A. The Special Term Opinion.

Mr. Justice Cuff's opinion reveals two major misapprehensions. First, he assumed that it was essential to the People's case that it be shown that the defendant had *intentionally* built its bank in such a way and conducted its business in such a way as to show a *fraudulent purpose* to mislead the public. He overlooked the finding, implicit in section 258 of the Banking Law, that the use by any bank, other than a savings bank, of the words "saving" or "savings", would tend to mislead the public. Justice Cuff, in dealing with a police power statute, disregarded the legislative purpose and exonerated the defendant from responsibility for the obvious consequences of its business and advertising policies on the very narrow finding that an actual *fraudulent purpose* had not been shown. We question the correctness of this finding, since, as the Appellate Division and Court of Appeals have found, defendant deliberately violated the statutory prohibition (R. 679, 685), without regard to the *effect* of its violation; and in view of the fundamental legislative objective of protecting the public from misleading advertising.

Special Term not only failed to show a comprehension of the Legislature's purpose. It misapplied the supremacy doctrine, invalidating our New York statute when Congress had not even entered the particular legislative field embraced by our statute—that of protecting potential mutual savings bank depositors from misleading advertising. Special Term did not even note that the federal government had not entered that particular field. Nor did it note that Congress had, at no time, clearly or explicitly authorized national banks to use the prohibited words in their advertising.

These major errors in Special Term's reasoning are demonstrated in various statements contained in its opinion. We shall discuss them insofar as they are pertinent to the disposition of this appeal.

1. How Special Term Disregarded Respondent's Misleading Use of the Words "Saving" and "Savings."

(A)

Special Term stated that the issue at bar was "not one of wrongdoing" (R. 656); but simply one of power to legislate with relation to national banks (R. 656). But it failed to grasp that the power exercised by the Legislature was a *power to prevent wrongdoing* and that such power had been exercised *without any discrimination* against national banks.

Special Term failed to realize, apparently, that the particular sort of "wrongdoing" which the Legislature sought to prevent was the use by any bank (as well as other organizations and persons) of the words "saving" or "savings", so that potential depositors would be *misled* into believing that they were dealing with savings banks. Special Term's exculpation of the defendant as a wrongdoer, in effect, permitted the use of words found by the Legislature to be misleading, without regard to the natural consequences of the use of the misleading words.

Special Term commented upon the State's failure to submit "proof of intent to deceive" (R. 657), but did not perceive that it was obliged by the terms of the statute, to find that the defendant's admitted use of the words "saving" and "savings" was misleading and deceptive. It made no such finding. It disregarded the legislative finding; and, instead, accepted as true the defendant's

protestation of an innocent purpose (R. 657).[14] In accepting the defendant's protestation of innocence, Special Term attributed no significance to the fact, which it noted elsewhere, that, whereas other national banks (as well as state commercial banks) refrained from using the terms "saving" and "savings" in their business, the defendant had, since 1947, used the prohibited words in order to secure to itself the unfair competitive advantage of those words (R. 657-658). We do not believe that Special Term was compelled to be so naive as to assume that the defendant sought the competitive advantage of these words without having undertaken the risk of being misunderstood in their use and of misleading careless, gullible or ignorant members of the public into believing it was a savings bank.

After having stated very early in its opinion: "I have disposed of the fraud angle of this litigation; it will not again be referred to" (R. 657), Special Term found it necessary, toward the end of its opinion, to pronounce: "The element of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto" (R. 667).[15]

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[14] Cf. *Radio Officers' Union* v. *Labor Board* ..... *U .S.* ..... decided Feb. 1, 1954, dealing with an Act of Congress which this Court held dispensed with the necessity of supplying specific evidence of intent, and which applied the common law rule that "a man is held to intend the foreseeable consequences of his conduct." See also *Pereira* v. *U. S.* ..... U. S. ..... decided the same day, applying the same rule of reasonable foreseeability to a problem of causation.

[15] The Court of Appeals has sustained Special Term only to the extent that it has concluded that there is no basis in the record for finding that the defendant violated the portion of Section 258 which prohibits "soliciting or receiving deposits as a savings bank" (R. 685). In substance, the Court of Appeals has found: that the bank "violated so much of Section 258 * * * as prohibits the use of the two words 'saving' and 'savings' "; and that it has not otherwise solicited or received deposits as a savings bank.

It is clear, therefore, that Special Term remained concerned solely with the defendant's *intent* and failed to give effect to the Legislature's purpose to protect the public against a misleading type of advertising. The focus of Special Term's misdirected attention is, perhaps, best illustrated by these two sentences in its opinion (R. 657):

> "The proof offered by plaintiff need not be detailed, because defendant admits all of the facts upon which plaintiff rests its case. It challenges only the motives ascribed by plaintiff that defendant sought to represent itself as a savings bank."

After so stating, Special Term proceeded to fall victim to the defendant's assertions of "good faith" in using the prohibited words.

(B)

Having stepped off in the wrong direction, Special Term continued to ignore the warning signs contained even in the proof offered by the defendant in support of its defense.[16] Most of this proof was offered to show that the defendant and other national banks were being hampered by their inability to use the prohibited words. We shall discuss later the failure of this proof to meet the standards of constitutional doctrine (*infra*, pp. 51-104). For the moment, we note simply that Special Term failed to observe that the defendant's own evidence demon-

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[16] Special Term's somewhat careless treatment of this testimony is revealed, in part, by its statement that several national bank officers had testified that "deposits in national banks were of two types—demand and savings" (R. 657). Actually, the testimony indicated that the basic distinction is between "demand" and "time deposits", the latter category of deposits being one that includes "savings" deposits (R. 481). Moreover, these two types of deposits are maintained not only in national banks, but in other types of commercial banks.

strated that a factual basis existed for the Legislature's finding that the use of the prohibited words would mislead the public.

(C)

The substance of the testimony of several bank officers and the conclusion demonstrated by defendant's "sample poll" was that the terms "saving" and "savings" were better understood by the public than the terms which were generally used by commercial banks, including national banks, such as "thrift", "compound interest" and "special interest" accounts (R. 657, et seq.). Special Term stated (R. 659-660):

> "Defendant also introduced evidence concerning a sample poll to show the public understanding of the following terms: 'savings', 'thrift', 'compound interest' and 'special interest' as they relate to bank accounts (278). The object of the defense in introducing this evidence was to demonstrate that the term 'savings account' is well understood by the public; that when disposed to open a bank account, the public reacts to the power of suggestion which the word 'savings' generates and turns to the savings bank with its business; that the three terms which defendant and other national banks are forced in their publicity to substitute for 'savings' are not well understood and do not attract depositors in anything like the numbers that the word 'savings' does."

That the public understanding of the words "savings accounts" had been developed in New York over more than a century of doing business with savings banks (R. 284) was a fact which Special Term did not see fit to note. Nor did Special Term seem to observe the significance, as a basis for legislative action, of the culture pattern which had developed in New York—that "the public reacts to the power of suggestion which the word 'savings' gener-

ates and turns to a savings bank with its business" (R. 660).

Nor did Special Term seem to comprehend that the defendant was simply confessing that, up to the date of its survey, *commercial* banks generally had *not* effectively educated the public as to the significance of the terms which they had been using to attract *interest-bearing deposits.*

(D)

In one portion of its opinion, Special Term appeared to be showing some respect for New York's legislative wisdom in maintaining a separate category of banks, known as savings banks (R. 664-665). Then, in complete defiance of the mandate of the New York State Constitution and *usurping the function of the Legislature,* it questioned whether any special legislation protecting savings bank depositors was any longer necessary, since the federal Government now insured deposits in all banks (R. 664).

Before revealing its tendency to become legislative, Special Term had recognized (R. 664):

> "There is a difference between savings banks and commercial banks, including national banks (Bank of Redemption v. Boston, 125 U. S. 60). The savings bank has no stockholders. It is owned, if owned at all, by the depositors; total amount that each depositor may deposit is limited; its officers are their employees whom they appoint to receive and invest their deposits which are to be returned to them with the earned interest upon reasonable demand. There are no profits, as such. Profits, if any, ultimately are returned to the depositors in the form of interest [sic]. The investments made by their officers are circumscribed. They may make no commercial loans (loans on unsecured notes or notes secured by personal

property other than 'legal investments'); the amounts of their mortgage loans on realty are surrounded by statutory restrictions referable to the appraised value of the pledged realty, its location, the nature and age of the improvement thereon, amortization arrangements, duration of loan and stability of borrower (Sec. 235) (6), N. Y. Banking Law)."

Special Term also noted (R. 664):

"The commercial (national) bank is owned by its stockholders. Its officers are the employees of the board of directors, who in turn are the elected representatives of the stock. Those officers are expected, in managing the bank, to produce profits, which go to the stockholders in the form of ordinary dividends. A commercial bank may make, in the exercise of the sound judgment of its officers, unsecured loans and loans secured by personality, which may even be merchandise. There is no limit upon the total amount it may receive from each depositor. It may provide money on mortgage loans like the savings bank based upon the appraised value of the pledged realty, but there are not the other rigid restrictions which are imposed upon savings banks (12 U. S. C. A. 371). *While national banks receive and record their savings deposits separately from their demand deposits, both are pooled and provide one working fund. Thus savings deposits control as much as demand deposits, the volume of lending and investing in which national banks indulge.*" (Italics supplied.)

And Special Term wrote (R. 665):

"It has been said that the savings bank is a semi-public institution; that the state in its wisdom seeks to encourage those who will save, particularly in small amounts; that the state has furnished a haven

for the thrifty. I do not wish to cast the slightest reflection upon commercial banks and their stability when I say that the legislation with respect to savings banks enacted by this state over the years was unmistakably intended to render the savings bank as safe and sound as laws could, to the end that those small depositors, encouraged as I have said to save, would run the least possible risk of losing their funds, and, incidentally, would receive as much interest [sic] as safety would permit. The power and discretion of the officers of savings banks are indeed narrow and circumscribed."

Even more specifically, Special Term observed (R. 665):

> "The New York State legislatures, enacting laws from time to time, were always seeking to protect deposits in savings banks, it would seem solely for the benefit of the depositors, to assure each depositor as far as laws could assure, that his or her deposit would always be available upon reasonable demand."

Nevertheless, Special Term, substituting its judgment for that of the Legislature and completely disregarding the New York Legislature's efforts to preserve the separate identity of "savings banks" suggested that *state protection of depositors was no longer necessary* since the federal government now offered all depositors an insurance policy against all losses (R. 665). Special Term might just as well have suggested that *all protection* of savings and other deposits *by state regulation* completely cease and that the identity of savings banks be obliterated since the federal government had taken over as an insurer.

(E)

How completely Mr. Justice Cuff was led astray by the defendant is apparent from his statement of the purpose

of this suit. He stated that "by this suit the state seeks to judicially eject from those fields [of banking business] an important cog in that system, albeit a creature of the United States Government—the national bank" (R. 666).

New York's purpose is not to exclude national banks or even state commercial banks from the field of receiving interest-bearing deposits. Its purpose by this suit and by the enactment of section 258 is to prevent the defendant from using misleading advertising and to prevent it even in "good faith" from using words that may have the effect of holding itself out as a bank of the type organized under Article 6 of the Banking Law—known commonly to the public in New York as a "savings bank".

2. Special Term's Misapplication of the Supremacy Doctrine.

Special Term's test of the constitutionality of section 258 was whether it could be harmonized with "section 371" (actually section 24) of the Federal Reserve Act. Justice Cuff incorrectly concluded that the two sections "could not be read together in harmony" (R. 666). It was his opinion that there was a "violent conflict of legislative authority" (R. 666). In coming to that conclusion, he failed to construe either section correctly. He erroneously assumed that the New York Legislature sought to eject national banks from the field of banking relating to savings deposits and to create a monopoly[17] in favor of savings banks (R. 665-666) and he gave to "section 371" of the Federal Reserve Act an interpretation not warranted by the terms of the federal statute (R. 671-672). The result of Justice Cuff's opinion was that the defendant was permitted to engage in a type of misleading advertising, not authorized by Congressional act and specifically prohibited to State as well as national banks by our statute.

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[17] Cf. *Roschen* v. *Ward*, 279 U .S. 337, 339-340.

(A)

Special Term correctly recognized that it was necessary, prior to holding New York's statute unconstitutional, to find that it conflicted with a congressional enactment; and the necessity of finding that section 258 impaired the operation of a federal instrumentality. But, as we shall show, Special Term completely ignored the entire trend of recent constitutional decisions which is to interpret federal and state statute so that they may operate without conflict. Furthermore, it disregarded controlling decisions by this Court holding that: nondiscriminatory statutes, applicable to the operations of national banks as well as state institutions, are constitutional; and that every regulation that affects national banks in an economically disadvantageous manner does not come within the constitutional prohibition against hampering Congressional objectives.

(B)

In interpreting the New York statute, Justice Cuff divided the section into three artificial "parts", but failed to read it as a whole or take into consideration its legislative history (R. 666-668). The third "part" of subdivision 1 of section 258, Special Term stated, "forbids national banks 'in any way (to) solicit or receive deposits *as a* savings bank'" (R. 666).

Actually, the statutory prohibition is not directed against "national banks" alone, but against "any bank, trust company, national bank, individual, partnership, incorporated association or corporation other than a savings bank or a savings and loan association". And nowhere in its discussion of the meaning of this section did Special Term note the fact that the term "savings bank", is defined in section 2 of the Banking Law to mean a "corporation organized under and subject to the provisions of

article six" of the Banking Law. Special Term, as a result, slipped into this reasoning (R. 666-667):

> "I will discuss the third part first. *A national bank is not a savings bank.* Nevertheless, Congress has granted it the power to solicit and receive 'savings deposits' (Sec. 371, *supra*). Obviously any national bank (the defendant is one) availing itself of that power, will provide space and facilities within its walls where such deposits may be made by the public and be received by the bank. That particular part of the bank of necessity will give off an air of sanctuary where savings are to be banked. To that extent the national bank would assume some of the attributes typical of an institution where savings are ordinarily deposited. I cannot perceive how such a situation could be avoided, if the national bank is to receive 'savings deposits'. Could it be that the authors of Section 258 (1) of the New York Banking Law intended to render that inevitable situation a violation of that law and to subject the national bank which, perforce gave it expression to the prescribed penalties? The provision 'nor shall' a national bank in any way solicit or receive dosposits as a savings bank' (Sec. 258 (1) *supra*), I consider refers to a national bank simulating a New York savings bank for purposes of deception (*People* v. *Binghampton Trust Co.*, 139 N. Y. 185 190). The elements of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto. Therefore, the 'third' part of Sec. 258 (1) may be disregarded." (Italics supplied.)

In so reasoning, Special Term failed to perceive that the prohibition was directed against *misleading* the public, in the solicitation or receipt of deposits into believing that *any institution* which had not been organized under the provisions of Article 6 of the Banking Law had been so

organized. And by confusing its discussion of Section 258 with a statement of the powers of a national bank to "receive * * * savings deposits" (Special Term states: "solicit and receive", (R. 666), Justice Cuff found himself unable to "perceive" how a national bank, exercising its power to receive savings deposits, could avoid misleading its depositors into believing it was a "savings bank" within the meaning of the New York statute (R. 667). As to this third "part" of the New York statute Special Term concluded that it was essential to show "purposes of deception", an element which is found missing from this litigation.[15]

After having separately read the "third part" of subdivision one of Section 258, Special Term noted that the "first" and "second" parts were "different" and might be considered together (R. 667). The "difference", it may be assumed, is that as to these subdivisions, Special Term concluded that it was unnecessary to show an *intent* to deceive. Had Special Term correctly read the statute, it would have understood that the Legislature had concluded that the use by a bank other than a savings bank of the words "saving" or "savings" in its banking or financial business, or in any of its advertising "in relation to" such business, were specific types of conduct *likely to mislead* the public into believing that it was a "savings bank".

Had Special Term kept in mind the legislative purpose to protect the *public*, it would not have strained as it did to construe the statute literally to prohibit national banks from using the word "savings" in any of its accounting records or in its form of reports to the federal comptroller of the currency (R. 668). The obvious purpose of the statute was to govern a bank's business relations with

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[15] The defendant has not been found by the New York courts to have violated this part of the statutory provision. See 305 N. Y. 453, 458.

the public, not its compliance with federal regulations specifying a detail of a required report as to its financial status. We do not believe that Special Term was justified in resorting to this extreme construction in order to reach the conclusion that the Legislature had erected an unconstitutional safeguard.

(C)

In construing "section 371" of the Federal Reserve Act, Justice Cuff assumed that the power granted to national banks to "receive savings deposits" carried with it as an incidental power a completely unrestricted right to use the word "savings" in any way in its business or its advertising (R. 670). We believe that this was a gross error. It is not essential to the business of national banks that they engage in misleading advertising.

Special Term sought to reinforce its implication of the power of national banks to use the word "savings" by pointing out that power of such banks to "receive savings deposits" had been added by an amendment to the federal statute after the statute had already included the power to receive "time deposits". It stated that "some controversy" had arisen concerning the right of a national bank to advertise and use the word "savings" which had in 1915 been resolved (!) in favor of the national banks by the "administrative branch" of the federal government; and that the inclusion in the federal statutory powers of the right to "receive savings deposits" was "intended to legislatively put that dispute at rest" (R. 671). For the moment, we need comment only that there is nothing in the federal statute (and nothing has been shown by way of congressional debate or committee report) to show any congressional intent to settle any *such* dispute or to divest the several states of their power to prevent misleading advertising. As we shall show, Special Term attributed to Congress a purpose not evident in the terms of the federal statute (*infra*, pp. 86-96).

(D)

Having misconstrued both Section 258 of the Banking Law and the purpose of Section 371 of the Banking Law, Justice Cuff then disapplied the supremacy doctrine. He found a conflict of federal and state law where none existed.

Without noting that misleading advertising by *any* bank might constitutionally be deemed an *improper* means of attracting business, Justice Cuff stated (R. 669):

> "To deny to defendant the right to invite the public by all *proper* means of expression at its disposal, to make 'savings deposits' with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of *financing*—in short, to defeat one of the main purposes for which it was created by Congress." (Italics supplied.)

Special Term then (R. 669-670) cited as examples of cases in which state legislation had been held to interfere with federal instrumentalities *McCulloch* v. *Maryland*, 4 Wheat. 316; *Missouri ex rel. Burnes National Bank* v. *Duncan*, 265 U. S. 17; *First National Bank* v. *California*, 262 U. S. 366; *Easton* v. *Iowa*, 188 U. S. 220; and *Fidelity National Bank & Trust Co.* v. *Enright*, 264 F. 236. We shall show these cases to be distinguishable as not involving statutes like that in the case at bar (pp. 104-118). We shall also cite many cases in which *police* power measures like that here involved have been sustained as constitutional (pp. 51-55).

Strangely enough, Justice Cuff recognized that (R. 670):

> "There is no doubt that creatures of the Congress are subject to states' police powers enacted into law (*Engel* v. *O'Malley*, 219 U. S. 128; 31 S. Ct. 190; 55 L. Ed. 128, affirming 182 Fed. 365)."

But due to his complete failure to appreciate the nature of Section 258, he continued (R. 670):

> "but the law which accordingly subjects them should be an exercise of a real police power."

And the basis upon which he concluded that Section 258 could not be deemed to be a police power statute, he stated as follows (R. 670):

> "The facts and law deny that contention in this situation because deposits (up to $10,000) in national banks are insured federally the same as savings banks' deposits are insured (up to $10,000). I must hold that Section 258 (1) is not that type of law."

We believe that the foregoing discussion sets forth the substance of and the major points of error in Special Term's opinion.

B. The Appellate Division Opinions

(1)

The Appellate Division reversed Special Term and directed that the defendant be restrained from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank (R. 679).

In its opinion, it emphasized the distinctive character which "savings banks" had during the previous century acquired in New York (R. 679); and held that the Legislature was entitled to find that, in the course of time, the word "saving" or "savings" had become so associated with savings banks that if used by another kind of bank, people were apt to be misled into thinking it to be a mutual savings bank (R. 679-680).

Contrary to Special Term, the Appellate Division held that Section 258 of the Banking Law was an appropriate exercise of the police power, aimed at preventing the deception of the public, innocently or intentionally (R. 680). It rejected Special Term's theory that the establishment of the Federal Deposit Insurance Corporation had eliminated the need for this exercise of the police power, not only because Federal Deposit Insurance Corporation offered only a limited type of protection, but also because its establishment "in no way prevents the public from being misled, to which protection it is entitled" (R. 680-681).

The Appellate Division further concluded that Section 258 was "not in conflict with federal law" (R. 681). After noting that national banks are limited to powers conferred by Congress, the Court wrote (R. 681):

> "It is conceded that the provision of the Federal Reserve Act relied upon by respondent (U. S. Code, title 12, sec. 371), does not expressly confer upon such banks the right to use the words 'saving' or 'savings' in their dealings with the public; and since both the state and federal statutes can consistently stand together it may not be implied that when Congress authorized national banks to 'continue * * * to receive * * * savings deposits' it intended thereby to supersede the state statute prohibiting them from advertising in a manner found to be misleading by the State Legislature (citing cases)."

Next, the Appellate Division found that the proof offered by the defendant failed to show that Section 258 unduly interfered with the operation of federal instrumentalities (R. 681). It rejected the defendant's contention that the statute was a "crippling obstruction" (R. 681). It pointed out that police power regulations are valid even when they impose some burdens on the national government itself, of the same kind as those im-

posed on citizens within the state's borders. It observed that a state's police power regulations are not to be deemed improper "solely because it places some burden on *national banks*" (R. 681-682).

The Appellate Division rejected defendant's contention that the statute was discriminatory (R. 682):

> "for by its terms it applies equally to all commercial banks, state-chartered as well as nationally-chartered."

In sustaining the validity of Section 258, the Appellate Division declined to have imposed upon it the rigid construction of the statute which the defendant demanded (R. 682). It held that the section did not forbid the use of the expressions ("special interest" accounts, "compound interest accounts" and "thrift accounts") whose use the State Banking Department has not sought to restrain (R. 682). And it further held that the statute was not to be construed to prohibit the publicizing of United States Savings Bonds in furtherance of government business nor to encompass reports by national banks to government departments (R. 682).

(2)

Presiding Justice Nolan filed a brief dissent (R. 682-683). He agreed with the majority that (R. 682):

> "the state has the power to protect the public, by preventing national banks from purporting to act as savings banks and even from using the word 'savings' in a manner which might deceive depositors in that respect."

But he held Section 258 of the Banking Law to be "in conflict" with Section 24 of the Federal Reserve Act (12 U. S. C. A., § 371) "in so far as it *forbids* the use of the

word 'savings'" (R. 682). He suggested that the State accomplish its purpose, instead, "by regulation", rather than by a prohibition which would prevent even a verbatim statement of the federal law specifically permitting national banks to "receive" *savings* deposits (R. 683).

In other words, Justice Nolan agreed with the State's position that the State's power to prevent misleading representations extended even to national banks: but he would have chosen a different method from that used by the Legislature to protect the New York savings public. Apart from the fact that it remains the New York Legislature's function to make such a choice of methods, Judge Nolan's dissent seems to overlook the fact that Congress has not explicitly exercised whatever power it may have to permit national banks to use in their advertising, words theretofore prohibited by State statutes. In so far as Congressional reports and debates are available, they do not show that until now Congress, after appropriate investigation and study, has weighed the risk of public deception and damage in a State which has built up special savings bank safeguards against the inconvenience occasioned to national banks of preventing them, along with other non-savings banks, from using words which a State Legislature has found to be deceptive.

The Court of Appeals Opinions

(1)

The undisputed evidence, the Court found, showed that the defendant had, since 1947, violated New York's prohibition against the use of the words "saving" and "savings" in the advertising and conduct of its banking business (R. 685). It sustained the Appellate Division judgment to the extent it prohibited such violation. But it found no evidence that the bank had violated the prohibition of the statute against "soliciting or receiving de-

posits as a savings bank." Accordingly, it struck out so much of the injunction prohibiting violation of that provision, as "unwarranted" (R. 685).

The Court then stated the real question before it to be whether the statute unconstitutionally contravened any controlling and overriding federal statutory provision on the same subject or interfered with the operations of a national bank (R. 685). As to the respective roles which the federal government and the several states play, generally, in regulating national banks, the Court recognized that (R. 686):

> "Under section 8 of article I of the Federal Constitution, Congress has power to, and does, incorporate national banks and has the paramount power of regulating them; any applicable Federal laws are supreme in the field; national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not interfere with the functioning of the banks, and which do not contravene Federal laws (citing numerous cases)."

The court then rejected the bank's contention that Congress had, by expressly authorizing national banks to receive "savings deposits", inferentially licensed them to advertise the provision of such banking services in words which were forbidden by New York laws (R. 686-687). It noted that New York law did not prevent the defendant from carrying on a particular type of business, but did forbid a misleading description of that business (R. 687). It pointed out (R. 687-688):

> "* * * while the Federal statute prescribes the kind of business that national banks may carry on, the State statute, to avoid deception of our people, interdicts the use, in that Federally-prescribed business, of certain nonessential words, and there is no Federal statute relating to the use of those words, as such. Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage."

On the question of whether the New York statute unduly impeded national banks in carrying out their lawful purposes, the Court of Appeals concluded that (R. 689):

> "the legitimate national banking activity, of taking and advertising for interest accounts, is not substantially interfered with by the State's prohibition of the use of misleading words."

In this connection, the Court deemed it significant that the record showed that national banks operating in New York had carried on their business of receiving this type of deposit by the use, in their advertising and elsewhere, of such synonymous expressions as "special interest account", "thrift account" and "compound interest account" (R. 688-689). Insofar as the record presented a question of fact as to the substantiality of that interference, the Court found that (R. 689):

> "* * * the weight of evidence confirms the finding of the Appellate Division that the number of accounts of the 'savings type' has increased greatly in those national banks in the State which have obeyed subdivision 1 of section 258, and that those national banks 'have enjoyed continued prosperity notwithstanding said statute' (281 App. Div. 757, 758)."

(2)

The two dissenting judges concluded that New York's prohibitory language conflicted with the Congressional provision authorizing national banks to receive "savings deposits" and to pay interest thereon (R. 690). They were of the opinion that the right to accept "savings deposits" and maintain "savings accounts" (a term not referred to in the federal statute) could mean very little, (a conclusion belied by the evidence showing the very substantial business built up in New York by national banks in passbook-evidenced interest-bearing accounts) if the bank must hide that fact or announce it in terms that fail to make it clear (R. 690).

The minority opinion disregarded the fact that New York makes no claim that national banks should hide the fact that they are empowered to receive passbook-evidenced *interest-bearing accounts.* And on the subject of "clarity", the minority overlooked the fact that all New York seeks is that national banks shall make it "clear" by the use of non-misleading words that the interest-bearing accounts they are authorized to receive are not "the same thing" as savings accounts in savings banks. *Clarity* in advertising is what New York seeks to preserve by preventing the confusing use of a single set of words to describe two different things. We do not believe, to use the analogy of the dissenters, that under the guise of "watering or cultivation" to produce vegetables (e.g., advertising their power to receive deposits) national banks should be permitted to designate the product that is being grown in such a way as to make it appear that the vegetable which they are cultivating (Vegetable "B"), an interest-bearing account in a commercial bank empowered to make unsecured loans, etc., is really another vegetable (Vegetable "A"), a dividend paying account in a differently regulated type of bank, a mutual savings bank.

The dissenting judges incorrectly concluded, as had pecial Term, that national banking activities were uncon-titutionally hampered, upon the assumption that the tatute denied to defendant "the right to invite the public y all proper means of expression at its disposal to make savings deposits' with it" (R. 690-691). They failed to ote that a misleading use of terms in advertising could onstitutionally be deemed "improper"; and that it was ncorrect to *assume* or *infer* such usage to be "proper."

POINT I

Section 258 of the New York Banking Law, pro-ibiting banks other than savings banks from using the ords "saving" and "savings," constitutes a proper xercise of the New York's police power. It is designed o protect the public from the consequences of its own gnorance and carelessness as well as from intentional isrepresentation in identifying as "savings banks" in-itutions which do not have all the safeguards of New ork's "savings banks."

A. The police power is available to protect the public from the consequences of its own ignorance and carelessness as well as from deliberate fraud. The prohibition of the use of misleading terms is a proper exercise of the police power.

(1)

Banking business and banking practices may be regu-ted by the various states under their police powers. *Engel O'Malley,* 219 U. S. 128; *Assaria State Bank* v. *Dolley,* 9 U. S. 121; *Schallenberger* v. *First State Bank,* 219 U. S. 4; *Nobel* v. *Haskell,* 219 U. S. 104, 110-113. See also *ueenside Hills Realty Co.* v. *Saxl,* 328 U. S. 80, 82, where is Court noted the great scope of the police power and *lsburg* v. *Maryland,* U. S., , decided January 11, 54, observing that the "presumption of reasonableness" police power legislation "is with the State."

(2)

The police power may be exercised to protect the ignorant and rash from the consequences of their own folly. *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374. A State may in the exercise of this power afford protection against ignorance, incapacity and imposition. *Dent* v. *West Virginia,* 129 U. S. 114, 122; *Plumley* v. *Massachusetts,* 155 U. S. 461, 471-472, 478-479; *Crossman* v. *Lurman,* 171 N. Y. 329, aff'd 192 U. S. 189; and *Graves* v. *Minnesota,* 272 U. S. 425, 427.

Measures by the States, designed to prevent deception and confusion have been held to be within the proper scope of their police powers. See *Sage Stores Co.* v. *Kansas,* 323 U. S. 32, sustaining Kansas legislation against "filled milk."[19] See also *Hebe Co.* v. *Shaw,* 248 U. S. 297, sustaining a prohibition enacted by Ohio against the sale of condensed milk made otherwise than from whole milk as a proper exercise of legislative power to protect the public against fraudulent substitution. See also *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204, holding that it was within the police power of the State of Mississippi to include within the prohibition of the sale of intoxicating liquors, the sale of malt and other liquors sold under the guise of innocent beverages.

State legislation designed to prevent the deception of the public in the sale of stocks and other securities has been

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[19] In *Carolene Products Co.* v. *United States,* 323 U. S. 18, considering the constitutionality of a similar Act of Congress prohibiting the manufacture, sale or shipment of "filled milk," the Court stated (p. 23):

> "The possibility and actuality of confusion, deception and substitution was appraised by Congress. The prevention of such practices or dangers through control of shipments in interstate commerce is within the power of Congress."

upheld against challenges that such regulation "burdened" interstate commerce. See *Hall* v. *Geiger-Jones*, 242 U. S. 539 (1916). See also *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U. S. 153, where this Court sustained the constitutionality of a law prohibiting the offering for sale as "Ice Cream" of any article not containing butter fat in reasonable proportion, as being within the police power. And see *Powell* v. *Pennsylvania*, 127 U. S. 678, where this Court sustained a statute prohibiting the manufacture of oleomargarine and held that the Fourteenth Amendment was not designed to interfere with the exercise by the States of their police power for the protection of health, *the prevention of fraud* and the preservation of public morals. See also the *Trading Stamp Cases, Rast* v. *Deman & Lewis*, 240 U. S. 342, *et seq.*; *Merchants Exchange* v. *Missouri*, 248 U. S. 365; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Otis* v. *Parker*, 187 U. S. 606, 609; *Biddles, Inc.* v. *Enright*, 239 N. Y. 354.

(3)

The States may prohibit misleading advertising in the exercise of their police power. *Semler* v. *Dental Examiners*, 294 U. S. 608, 611. In that case, Chief Justice HUGHES met in this fashion a contention that a statute *restricting* the power of dentists to advertise prevented truthful advertising (294 U. S. 608, 612):

> "the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."[20]

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[20] New York has stated that its public policy as to its own institutions is (New York Banking Law, § 10):

> "to eliminate unsound and destructive competition among such banking organizations and thus to maintain public confidence in such business and protect the public interest and the interests of depositors, creditors, shareholders and stockholders."

Thus the States have the power not only to prevent misleading advertising, but in certain situations, including those where the States exercise their power to regulate the conduct of the various professions, they have the power completely to prohibit any advertising at all for patronage. *Pollock* v. *Board of Regents,* 266 App. Div. 696, aff'd 291 N. Y. 720. See also *Pollock* v. *Board of Regents,* 277 App. Div. 808, leave den. 277 App. Div. 285.

In the instant case, of course, Section 258 is not designed to prohibit *entirely* any advertising for patronage, but simply to prevent the use of words which New York's Legislature has found to be misleading. See also *Weber* v. *Stoddard,* 270 App. Div. 865, leave den. 270 App. Div. 960.

The police power extends to the prevention of the use of misleading words, even though the words are ones in common usage. See *People* v. *Somme,* 120 App. Div. 20, aff'd 190 N. Y. 541, where a prohibition against the use of the word "doctor" by a person unlicensed by the State of New York was enforced. See also *Bowen* v. *City of Schenectady,* 136 Misc. 307, aff'd 231 App. Div. 779, sustaining the constitutionality of a statute prohibiting the use of the title "architect" except by persons duly licensed by the Board of Regents. See also *Bratton* v. *Chandler,* 260 U. S. 110, sustaining the constitutionality of legislation prohibiting the use of a non-professional designation (real estate broker) except by persons properly licensed; and see *Holding Co.* v. *Reis,* 240 N. Y. 424, 427; *Roman* v. *Lobe,* 243 N. Y. 51.

In *People ex rel. Bennett* v. *Laman,* 277 N. Y. 368, 375, dealing with a medical practice statute, the Court of Appeals followed the rule in the *Dent* case (*supra*), that the police power authorized the State to prescribe all such regulations as in its judgment would tend to secure the people from the consequences of ignorance and incapacity, as well as of "deception and fraud." See also *People* v. *Bernstein,* 237 App. Div. 270 which involved the provision

in Section 1355 (now 6804) of the Education Law which made it a misdemeanor for unlicensed persons to advertise a place of business or refer to it "by the terms, 'drugs,' 'medicines,' 'drug store' or 'pharmacy'."

Where the legislative purpose is to prevent the public from being misled as to such matters, it is no defense that the misleading reprsentation was made in "good faith." *People* v. *Mari*, 260 N. Y. 383. In that case, this Court held (pp. 388-9):

> "When such conduct is a fraud or a pretense, as it appears to have been in this case, the courts are not so blind and dumb as to be taken in by it. It is no defense that defendant acted in good faith or did what was customary (*People* v. *Cole*, 219 N. Y. 98). The only question is whether he violated the statute. Of this there seems to be no doubt."

In the instant case, it is undisputed that the defendant deliberately violated Section 258 of the Banking Law. Contrary to the finding of Special Term, it is clear that the defendant was guilty of "wrongdoing, whatever may have been its "intention."

(4)

The Federal Government itself recognizes the necessity of preventing *misleading advertising* in its regulation of trade and commerce. Under the Federal Trade Commission Act, it has been held *unnecessary to prove that deceptive advertising was engaged in with intent to deceive.* See *Gimbel Bros.* v. *Federal Trade Commission*, 116 F. 2d 578; *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365. See also *Trade Commission* v. *Raladam Co.*, 316 U. S. 149; *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509; *Gulf Oil Corp.* v. *Federal Trade Commission*, 150 F. 2d 106. And see *Federal Trade Commission* v. *Real Products Corp.*, 90 F. 2d 617.

Indeed, Congress has given the Federal Trade Commission the power to curb "any unfair method of competition or unfair or deceptive act or practice in commerce" (15 U. S. C. A., § 45)[21]; the dissemination of any false advertisement being defined by Congress as an "unfair or deceptive act or practice" (15 U. S. C. A., § 52b).

The New York Legislature was similarly entitled to consider the effect that the use of the words "saving" or "savings" by institutions which are *not savings banks* might reasonably be expected to have on the public. See *P. Lorillard Co.* v. *Federal Trade Commission,* 186 F. 2d 52, 58.

Decisions of the Federal Courts under the Federal Trade Commission Act demonstrate that neither the Legislature nor Special Term was required to conduct a poll of public understanding or knowledge prior to determining that the use of the words "saving" and "savings" by non-savings banks, would be misleading to the public. See *Zenith Radio* v. *Federal Trade Commission,* 143 F. 2d 29, 31.

In the *General Motors Corp.* v. *Federal Trade Commission,* 114 F. 2d 33, Judge A. N. HAND stated (p. 36):

> "It may be that there was no intention to mislead and that only the careless or the incompetent could be misled. But if the commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in

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[21] "Banks" are excepted from Trade Commission control by section 45, subdivision a, of the Trade Commission Act. In *Hurst* v. *Federal Trade Commission,* 268 F. 874, this exception was assumed to have been placed in the Act because "banks" were subject to the direction and control of a separate commission similar to the Trade Commission. It should be noted, however, that neither the Federal Reserve Board nor the Comptroller of the Currency has, so far as this record shows, promulgated any regulation purporting to deal with the subject of misleading advertising *by national banks.*

> the words of the prophet, Isaiah, 'wayfaring men, though fools, shall not err, therein,' it is not for the courts to revise their judgment."

See also *Charles of Ritz, etc.* v. *Federal Trade Commission,* 143 F. 2d 676, 680; *Stanley Laboratories* v. *Federal Trade Commission,* 138 F. 2d 388, 392-3; and *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165-7.

In *Federal Trade Comm.* v. *Algoma Co.,* 291 U. S. 67, the federal government, exercising its regulatory power under the Commerce Clause, succeeded in prohibiting the misleading use of the words "California white pine." In sustaining the government's action, Justice CARDOZO pointed out (p. 75):

> "There are times when a description is deceptive from the very fact of its simplicity."

Justice CARDOZO also recognized that (p. 78):

> "Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Comm'n* v. *Royal Milling Co.,* 288 U. S. 212, 216; *Carlsbad* v. *W. T. Thackeray & Co.,* 57 Fed. 18."

He further stated (p. 81):

> "An analogy may be found in the decisions on the law of trade marks, where the principle is applied that a name legitimate in one territory may generate confusion when carried into another, and must then be

given up. *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 416; *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 100. More than half the members of the industry have disowned the misleading name by voluntary action and are trading under a new one. The respondents who hold out are not relieved by innocence of motive from a duty to conform. Competition may be unfair within the meaning of this statute and within the scope of the discretionary powers conferred on the Commission, though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. *Redgrave* v. *Hurd*, L. R. 20 Ch. D. 1, 12, 13; *Rawlins* v. *Wickham*, 3 De G. & J. 304, 317; *Hammond* v. *Pennock*, 61 N. Y. 145, 152. That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive."[22]

In unfair competition cases, persons engaged in "simulation" of products, names or identities are deemed to have intended the results of their simulation. *Woodbury* v. *Woodbury*, 23 F. Supp. 162, 168; *My-T-Fine* v. *Samuels*, 69 F. 2d 76, 77. It is not necessary to show a "guilty knowledge" or "fraudulent intent." *Higgins* v. *Higgins*

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[22] These statements, with reference to federal powers under the commerce clause, are pertinent here, since State action under the police power is often directed toward objectives similar to those sought to be achieved by the federal government under the commerce clause. For example, see *Quaker Oats Co.* v. *City of New York*, 295 N .Y. 527, where both powers were directed toward regulation of the sale of horseflesh and other animal food.

Soap Co., 144 N. Y. 462, 471; *Lawrence Mfg. Co.* v. *Tennessee*, 138 U. S. 537, 549; *Aunt Jemima Mills* v. *Rigney*, 247 F. 407, 409.

The likelihood of confusion and the probability of deception have been held sufficient to warrant judicial protection in the field of unfair competition. *Eastern Const. Co.* v. *Eastern Engineering Co.*, 246 N. Y. 459, 463; *American Foundries* v. *Robertson*, 269 U. S. 372, 381. We argue that New York has, in the enactment of Section 258, acted to prevent deception and confusion of the public as to the nature of mutual savings institutions.

In this connection, it should be noted that even the right to use one's own name in his own business is subject to the qualification that one shall not use it for the purpose of perpetrating a fraud on the public. *Kraysler* v. *Kraysler*, 251 App. Div. 446; *World's D. M. Assn.* v. *Pierce*, 203 N. Y. 419, 424, 425.

And the common right to use geographical or descriptive terms, as well as an individual's right to use one's own name, has been held not to include "a use which is calculated to deceive." *Corning Glass Works* v. *Corning Cut Glass Co.*, 197 N. Y. 173; *Herring, etc., Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559.

> "The name of a person or of a town may have become so associated with a particular product that the mere attaching of that name to a similar product would have all the effect of a falsehood."

In unfair competition cases it has long been recognized, too, that words in common use may acquire a *secondary meaning*, in association with a particular enterprise or business. See 9 L. R. A. 148; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; and 150 A. L. R. 1095.

See especially the cases cited in the annotation at 150 A. L. R., at pages 1134 and 1135, holding that protection of *property rights* in words which have acquired such secondary meaning will be granted where the defendant either is using the words in their secondary sense for purposes of simulation or where there is likelihood that the public will be deceived by the defendant's usage.

Of course, at the time the first subdivision of Section 258 was enacted in its present form, the New York Legislature was entitled to find that the words "saving" and "savings" had acquired a type of secondary meaning in association with the words "bank" or "banks"; and to decide that fulfilment of the legislative purpose to *protect the public from deception* warranted a prohibition against the use of the words by *any* bank other than a "savings bank." See 1922 Report of the Attorney General 139.

B. Section 258 of the Banking Law indicates a legislative determination to protect the public from the misleading use of the words "saving" and "savings" in advertising any banking business. *People* v. *Binghampton Trust Co.*, 139 N. Y. 185; *People* v. *Franklin National Bank*, 305 N. Y. 453.

Section 258 of the Banking Law, in its first subdivision, prohibits the use by any banks or institution, other than a savings bank, of the words "saving" or "savings" in "its financial business" or in "any advertisement"; and prohibits any individual or corporation "other than a savings bank" from "in any way" soliciting or receiving deposits "as a savings bank."

The legislative purpose of the prohibition is to prevent misleading representation. New York's Court of Appeals, dealing with an earlier form of this statute, has so held.

People v. *Binghampton Trust Co.*, 139 N. Y. 185.[23] In that case, the Court of Appeals rejected the proposition that the object of Section 258 (then Section 283) was to create a monopoly in favor of savings banks.

At the time the *Binghampton Trust* case (*supra*) was decided, the statute prohibited any corporation from advertising or putting forth a sign "as a savings bank." The statute then read (L. 1882, ch. 409, § 283):

> "It shall not be lawful for any bank, banking association or individual banker, firm, association, corpora-

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[23] The entire history of this statute confirms the correctness of this holding. As long ago as 1858, New York prohibited banks other than savings banks from advertising as savings banks. By Chapter 132 of the Laws of 1858, the Legislature enacted a provision that:

> "* * * it shall not be lawful for any bank, banking association or individual banker authorized to issue circulating notes by the laws of this State, established in any city or village where a chartered savings bank is located and transacting business, to put forth a sign as a savings bank:".

By 1875, the prohibition had been amended to read (L. 1875, Ch. 371, § 49):

> "It shall not be lawful for any bank, banking association or individual banker to advertise or put forth a sign as a savings bank or in any way to solicit or receive deposits as a savings bank; and any bank, banking association or individual banker which shall offend against these provisions shall forfeit and pay for every such offence the sum of one hundred dollars, for every day such offence shall be continued, to be sued for and recovered in the name of the people of this State, by the district attorneys of the several counties, in any court having cognizance thereof, for the use of the poor chargeable to said county in which such offence shall be committed."

The 1875 provision was construed in *People* v. *Doty*, 80 N. Y. 227, not to apply to "individuals" who operated as private bankers, but only to "individual bankers" authorized to do business as such under the Banking Laws. The Court recognized that its construction of the statute permitted misleading advertising by *individuals not authorized to do a banking business* under our Banking Law, but prohibited misleading advertising by *authorized bankers* (80 N.Y. 227, 230, 235). Hence, the specific provision in the present statute directed against *any "individual"*.

> tion, person or persons, to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank; and any bank, banking association or individual banker, firm, association, corporation, person or persons, which shall offend against these provisions, shall forfeit and pay for every such offence the sum of one hudred dollars for every day such offence shall be continued, to be used for and recovered in the name of the people of this State, by the district attorneys of the several counties, in any court having cognizance thereof, for the use of the poor, chargeable to said county in which such offence shall be committed."

In the *Binghampton Trust* case, the stipulated facts were that the bank had simply set forth in its passbooks certain interest rules similar to those employed by savings banks. These rules did not use the words "saving" or "savings" or contain any other statements that were calculated to deceive or mislead the public. Accordingly, the Court held that no violation of the statute had been shown. The Court declined to accord to savings banks any "monopoly of any set of business rules"[24] and held that the statute embodied (139 N. Y., 190):

> "the legislative intention that a corporation shall not, in soliciting and receiving deposits, represent, or hold out itself as a savings bank so as to deceive the public."

As to circulars and advertisements distributed by the bank, the facts as to which were also stipulated, the Court was unable to find that there had been (139 N. Y., 190):

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[24] In this case no attempt is made to set up any such monopoly of rules. We simply seek to prevent misleading representation of the defendant as a "savings bank."

"either a soliciting of deposits from the public in the character, or under the pretense of being a savings bank, *or an advertising of the corporate business in such manner as to deceive persons into believing it to be that of a savings bank,* • • •" (Italics supplied.)

Repeating its holding that there could be no exclusive appropriation of business *methods,* the Court further stated (139 N. Y., 192):

"Whatever tends to the protection of a bank for savings is in the public interest, and *it is in the line of that protection that any appearance, or external sign, or representations should be prohibited, which would deceive and cause the public to suppose that a business institution, really organized for the gain of its members, was a savings bank.* But the line ends with securing that *general protection against public deception,* and does not project itself into the mere methods by which transactions with depositors or dealers are conducted." (Italics supplied.)

Subsequent legislation, therefore, in fulfillment of the purposes of old section 283 of the Banking Law may be deemed to have been directed toward accomplishment of the purpose set forth by the Court of Appeals—"general protection against public deception" particularly with relation to the subject of whether an institution is a non-profit, mutual institution, or one "organized for the gain of its members."[25]

Nothing in any of the amendments to old section 283 (present section 258) indicates any legislative intention

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[25] Cf. *United States* v. *5 Gambling Devices,* ..... U. S. ....., decided December 7, 1953, where a Congressional Act's constitutionality was attacked for "vagueness." New York has avoided this pitfall by being precise and specific in indicating two words which it regards as deceptive.

to deviate from the general purpose ascribed to it in the *Binghampton Trust Company* case. The amendment of 1892, by which the section was renumbered as section 131, removed certain language as to the method of prosecution, but continued the statutory prohibition in substantially the same form:

> "§ 131. Advertisements of unauthorized savings banks prohibited.—No bank, banking association, individual banker, firm, association, corporation, person or persons shall advertise or put forth a sign as a savings bank, or in any way solicit or receive deposits as a savings bank."

In 1904 (L. 1904, ch. 568) section 131 was amended to give express authorization to school officials to make savings collections from pupils and to use the words "system of school savings banks" or "school savings banks" in circulars, reports and other printed or written matter in connection therewith.

In 1905, section 131 was amended to bring it substantially to its present form. It was by that amendment that the misuse of the word "savings" was first forbidden under this section of the Banking Law. The first sentence of section 131 was amended to read as follows (L. 1905, ch. 564):

> "§ 131. Advertisements of unauthorized savings banks prohibited.—No bank, banking association, individual banker, firm, association, corporation, person or persons shall make use of the word 'savings' in their banking business, or advertise or put forth any advertising literature, or sign as a savings bank, or in any way solicit or receive deposits as a savings bank, other than a savings bank or a building and loan association organized under the laws of the State of New York."

Thus for more than 40 years prior to the time defendant first violated the statute, the legislature had prohibited

per advertising containing the word "savings." And most a half-century before Special Term's decision, nstitutionality of the prohibition had not been suc-lly challenged. It may be noted that the 1905 statute ned an exception in favor of "building and loan ations" organized under New York Law. This ex-n in favor of certain mutual, non-profit associations, ade to apply in 1909, instead, to "cooperative sav-nd loan associations" organized under New York L. 1909, Ch. 497), the section having been renumbered 1909 revision of the Consolidated Laws, as section f the Banking Law.[26] It should be noted that, as led, section 160 also permitted school officials, under exception, to deposit "school savings" in villages ties where there was no savings bank "in any savings an association, trust company, state or national bank, d in the state and having an interest department."

section was renumbered in the Banking Law of 1914 tion 279 (L. 1914, Ch. 369). As amended in 1914, ection was divided into two subdivisions, the first

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nce 1909, the purpose of the Legislature appears to have been nd the protection of this section to potential savings and loan tion investors as well as to potential savings bank depositors. sent section 258, up to the word "nor". In any event, whether gislature be deemed in section 258 to have acted solely for the e of protecting potential savings bank depositors or to have or the purpose of protecting a broader group of persons inter-n mutual investments, the power exercised was a proper exer-the police power, calculated to prevent the deception of the And, even if the Legislature by this statute be found not to overed all possible misrepresentations (e. g. the possible mis-ntation by a savings and loan association that it was a savings the statute does not, as a result, become unconstitutional. ute is not invalid because it might have gone farther than it *Roschen* v. *Ward*, 279 U .S. 337, 339. *Semler* v. *Dental Exam-*294 U. S. 608, 610; *Salsburg* v. *Maryland*, U. S. , l Jan. 11, 1954. See also Banking Law, Art. X; and 12 U. S. §§ 1464, *et seq.* And see *Rochester Savings Bank* v. *Rochester Loan Assn.*, 170 Misc. 983.

dealing with the prohibition and the second with the exception for "school savings" accounts. In its 1914 form, the prohibitory portion of the first subdivision read as follows:

> "§ 279. Advertisements of unauthorized savings banks and the use of the word 'savings' prohibited; exception as to school savings.
>
> "1. No bank, national banking association, trust company, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or its equivalent, in its banking business, or advertise or put forth any advertising literature or sign containing the word 'saving' or 'savings,' or its equivalent, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank."

The 1914 amendment thus made the prohibition specifically applicable to "national" banking associations and extended it beyond the word "savings" to include the wards " 'saving' or 'savings' or its equivalent."[27]

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[27] In 1916, it was again amended (L. 1916, Ch. 90), but only in the portion thereof (by then numbered subdivision 2) dealing with "school savings banks" or "Thrift funds." Subdivision 2 of the section was amended by Chapter 128 of the Laws of 1920 and by Chapter 22 of the Laws of 1923.

By L. 1952, ch. 546, effective April 7, 1952, the exception contained in subdivision 2 of the section (by then numbered 258) was extended to permit school savings moneys to "be deposited in some savings bank in the state, be used for the purchase of shares in any savings and loan association organized under this law, or under the laws of the United States, whose principal office is located in the state of New York, or be deposited in any trust company or state or national bank located in the state, and having an interest department." The same amendment struck from subdivision 2 the sentence which had theretofore stated it to be lawful to use the words "system of school savings banks" or "school savings banks" or "thrift funds" in circulars, reports and other printed or written matter used in connection with the purposes of subdivision 2.

In 1932, the first subdivision of section 279 (now 258) s amended so that it permitted the use of the word avings" in the name of the savings and loan bank of State of New York (L. 1932, Ch. 604); and in 1934, the ception was further broadened to cover "the name of y trust company all of the stock of which is owned by t less than twenty savings banks" (L. 1934, Ch. 255 which o contained a separability provision).

In 1938, old Article Six of the Banking Law was repealed d a new Article Six enacted, in which Section 258 re- aced old Section 279 (L. 1938, Ch. 352). Subdivision 1 Section 258 remained in the same form as had the first bdivision of old Section 279.

Subdivision 1 of Section 258 was last amended by Chap- 585 of the Laws of 1941, which extended the prohibition the subdivision to apply to the misuse of the words not ly in "banking" business, but also in "financial" busi- ss. The provision, as so amended, took effect April 20, 41 and it remains unchanged to date.[25]

The very wording of these amendments to the section dicates that the legislative purpose continued to be one preventing the public from being misled by usage of the ords "saving" or "savings" into believing that an insti- tion which had not been organized as a *mutual savings nk* under the provisions of Article 6 of the Banking Law as such an institution.

The exceptions contained in the present statute confirm is interpretation as the correct one to be given the stat- ute. For *"savings and loan"* association, as well as sav- g banks, are permitted to use the words "savings" and saving" in their business and their advertisements. *This*

[25] An attempt was made in the regular session of the 1953 Legisla- re to have the provisions of subdivision one of section 258 stricken t (Ass. Pr. No. 2798, Int. No. 2693; Senate Pr. No. 2716, Int. o. 2570). *It failed.*

exception extends, of course, to federal as well as state chartered savings and loan associations. Clearly, the Legislature has refrained from prohibiting the use of the word "savings" as to those financial institutions where it found that usage of the term would *not* be misleading to the public.

(2)

The policy of New York State to prevent the words "saving" and "savings" from being used in *misleading advertising* was long ago underlined by opinions of New York's Attorney General. See 1898 Report of the Attorney General, pages 265-267; 1902 Report of the Attorney General, pages 314-315; 1907 Report of the Attorney General, pages 473-475; 1908 Report of the Attorney General, pages 382-383; 10 State Department Reports, pages 489-491 (Attorney General's Opinion, dated January 2, 1917). These Opinions also noted a legislative policy to accord to depositors in savings institutions protection against the misleading use of those terms by national banks.

As early as 1907, the New York Attorney General had advised the New York Superintendent of Banks that national banks had no "right or authority in their banking business to hold themselves out as savings banks or to advertise as such" and that old section 131 of the Banking Law (now Section 258; see, *supra,* pp. 56-57) was "applicable to all national banks doing business in this state."

In the 1907 Opinion, New York's Attorney General properly placed great emphasis upon *Bank of Redemption* v. *Boston,* 125 U. S. 60, where this Court rejected a claim that a Massachusetts statute contained a provision improperly taxing shares of stock in a national bank at a higher rate than moneyed capital in hands of individual citizens of Massachusetts, which was kept on deposit in savings banks. Congress had by section 5219 of the Revised

tutes expressly permitted shares in a national bank be taxed by any State, in which a bank was located, a rate no greater than the rate assessed upon other *neyed capital*[29] in the hands of individual citizens of state. This Court, after citing its prior decisions in *rcantile Bank* v. *New York*, 121 U. S. 138 and *Davenport nk* v. *Davenport Board of Equalization*, 123 U. S. 83, tained the exemption of money on deposit in *savings* nks from taxation, even though national bank shares e taxed in the same manner as other *corporate* shares.

his Court stated, in the language later quoted in the 7 Opinion of the New York Attorney General (125 S., at p. 68; 1907 Report of the Attorney General 474):

"It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which fore-

[29] Note the emphasis which has been placed both by Congress and Court upon the distinction between organizations with and without capital stock, as offering an appropriate basis for different treatnt. *Bank of Redemption* v. *Boston*, 125 U. S. 60.

closes further discussion as to the present point in this case."

This Court thus approved the Massachusetts policy of differentiating between the treatment of mutual savings institutions and stockholder-owned commercial banking institutions. In so doing, it adhered to the position it had taken in dealing with a New York statute similarly favoring savings banks deposits with relation to taxation. In the *Mercantile Bank* case, this Court, referring to deposits in New York savings banks had stated (121 U. S. 138, 161):

> "*No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States.* They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the state. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community." (Italics supplied.)

Congressional intent at that time, therefore, must be deemed to have been to place national banks, for purposes of state taxation, on an equal footing with state *commercial* banks (institutions organized for gain or profit) and not subject to the same special considerations of protection accorded to mutual, non-profit savings institutions.[30]

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[30] With respect to *taxation*, Congress, in its search for new revenues, recently determined to discontinue the tax-free treatment accorded mutual institutions. (See the Revenue Act of 1951; Senate Report No. 781, September 18, 1951, re Tax Exempt Organizations, Subd. V B.) The removal of this exemption appears to have been based in part upon a Senate finding that mutual savings banks compete "with commercial banks and life insurance companies for the public savings." The existence of such competition would appear to make it all the more necessary that rules of *fair* competition be respected.

In 1908, the New York Attorney General advised the New York Superintendent of Banks, concerning section 131 (now section 258) of the Banking Law, as amended by Chapter 564 of the Laws of 1905 (1908 Report of the Attorney General, p. 383):

> "This law was not enacted for the benefit of any private interest but solely for the protection of the public. It would seem that any use of the word 'savings' in advertising a bank would be a suggestion or a pretense made to the public that the bank so advertising was doing business as a savings bank. Many expressions, other than the word 'savings,' but with similar meaning, could be used without conflicting with the above law and without possible deception.
>
> In my opinion the use by the First National Bank of the word 'savings' at the head of the advertisement inclosed is a violation of law."

In 1917, the New York Attorney General advised the New York Superintendent of Banks that section 279 (now 258) of the Banking Law was not in conflict with section 19 of the Federal Reserve Act, which defined "demand deposits" to include all "savings deposits" which were subject to not less than thirty days notice before payment. The Attorney General wrote, in part (10 State Department Reports, p. 491):

> "We cannot deny the right of national banks to receive deposits in the form of 'savings accounts,' but we feel quite certain that the above language does not empower such banks to do a 'savings bank business' as that business has come to be generally understood throughout the country, and therefore we are of the view that the State statute (section 279 of the Banking Law) is still operative against the use of the word 'savings' by any bank 'other than a' savings bank.

* * *

The words 'savings banks' have accordingly come to have a special meaning to small savers as denoting this increased protection to their deposits, and they would be deceived by its use by other banks. As *Congress did not,* we believe, intend to authorize a national bank to do business as a 'savings bank,' so it did not *intend to interfere with any safeguards for the small savings depositor which the State may have devised to protect him.* You may consult generally the cases distinguishing between a 'savings bank business' and the business of receiving deposits in the form of savings accounts. People v. Binghamton Trust Co., 139 N. Y. 185; Barrett v. Bloomfield Savings Institution, 54 Atl. Rep. (N. J.) 543, 552; State v. Peoples National Bank, 70 id. (N. H.) 542.

It may be stated also that it is the duty of the Attorney General to sustain State statutes such as section 279 of the Banking Law unless he is convinced that such legislation is no longer of force.

In conclusion section 19 of the Federal Reserve Act concerns itself only with the reserve necessary to protect different forms of deposits. No sanction is found therein for the use of the words 'savings department' by national banks in their business.'' (Italics supplied.)

Since 1917, therefore, it had been apparent that New York did not intend to permit national banks to advertise as savings banks or to use the words "saving" or "savings" or "its equivalent", in the absence of some clear Congressional action indicating an express intention to curtail the State's power to safeguard small depositors from misleading advertising. Yet Congress has not in the intervening years enacted any such legislation.

(3)

In *Provident Savings Institution* v. *Malone,* 221 U. S. 660, this Court recognized that a need existed for specially

rotecting the depositors of savings banks and that the ifference between deposits in savings and other banks forded a reasonable basis for classification in legislation. here the Massachusetts statute as to abandoned funds pplied only to deposits in savings banks. For a unanious Court, JUSTICE LAMAR wrote (p. 666):

> "There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage earners, moving from place to place, there is special reason for intervening to protect their interest in this class of property in banks as to which the State's supervisory power is constantly exercised."

In New York, savings banks had been created by special atutes until 1869.[31] Then the Legislature enacted a genal statute (L. 1869, ch. 213) to regulate and restrict the rganization of savings banks and institutions for savgs, which prescribed the procedure to be followed in the rganization of a bank, but still required legislative sancon for a savings bank's incorporation. In 1875, an act as passed (L. 1875, ch. 371) to conform the charters of *l savings banks to a uniformity of powers and rights* and provide for the organization of savings banks, their pervision and the administration of their affairs. As nended, the 1875 statute was included in the Banking aw (L. 1892, ch. 689). See the Consolidator's notes to e Banking Law (McKinney's Banking Law, Vol. 1, p. 6).

[31] "Moneyed" banking organizations, or banks of "deposit and discunt" had been chartered in New York, however, by special legislan only until 1838, when a general law was passed whereby banks ght be authorized and incorporated (L. 1838, ch. 260; McKinney's nking Law, vol. I, p. 5).

Probably since 1819 (R. 284) and at least since 1875, therefore, New York has provided for the creation of a distinctive type of banking institution known as a "savings bank." Section 258, in effect, seeks to protect the distinctiveness of that type of institution and to prevent the use of the word "savings" by other banking institutions, since it is likely to confuse and mislead the public into believing that such bank is a New York "savings bank."

By reason of the fact that mutual savings institutions of the type permitted and regulated by Article 6 of the Banking Law had been designated as "savings banks" in New York for more than a century prior to the time Section 258 was enacted in its present form, its Legislature was justified in assuming that the use of the prohibited terms by banking institutions otherwise organized would be misleading and confusing to the public.

While it is true that the money taken by commercial banks and held in their thrift or passbook accounts represents individual accumulations, just as savings bank accounts do, there is no requirement that the commercial banks make their *investments* in a specific list of securities as to which New York's Legislature, before authorization, has balanced carefully the safety of the principal invested as against a fair rate thereon. But even more important by way of distinction between New York's mutual savings institutions and commercial banks, is the fact that commercial banks, with their right to deal in demand deposits, have the power to create money while the savings institutions do not. For every dollar that goes on the books of a savings bank as an investment asset, the savings bank must have received a dollar in the form of a deposit. Commercial banks, on the other hand, can, through discount and other lending operations, extend immediate credit to a customer. This ability on the part of commercial banks to create "money" and thereby to increase its "assets" carries with it certain risks, even though commercial banks, in connection with their demand deposits, furnish a vital community

service. But since there are no limitations upon the uses to which thrift monies deposited in commercial banks can be put, these thrift dollars are subjected to the risks developed by the banks' commercial activities.

Even though the Legislature has in some respects extended the investment powers of savings banks within recent years (Court of Appeals, Brief, Point II of the New York State Bankers Association), the basic banking policy of the State has been for more than 100 years to furnish the public with a specialized type of institution to deal with a special type of sluggish deposit with a comparatively low turnover rate. Once these deposits are separated from the more volatile commercial transactions they may be put out in investments at longer terms which produce a higher yield without undue risk to depositors' funds. That policy is the foundation stone of New York's legislation dealing with both types of mutual institutions. We believe this differentiation is sound and that it is a State legislative problem basically to determine whether to continue to identify the specialized institutions by a particular name, whose use is prohibited to the jack-of-all-trades.

The entire spirit of the defendant's conduct was revealed by its assertion before the Appellate Division (p. 51) that "The fact that a savings bank has no stockholders while a national bank has is of no practical consequence to a depositor."[32] Even if depositors do not specifically know of this

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[32] In the Court of Appeals, too, the appellant continued to urge that savings deposits in national banks "are the same" as those in New York mutual savings Banks (Court of Appeals Brief, p. 58), disregarding again the vast differences between the nature and powers of the institutions in which the deposits were made and the nature of the *obligation* of national banks to pay *interest* at the rates to which they agree. Compare to the national bank's contractual *obligation* to pay *interest* on its passbook deposits, the dividends to which depositors in a New York mutual savings bank do not become entitled until after they have been declared *out of undivided profits* by strictly regulated savings banks' trustees. New York Banking Law, §§ 244, 245.

distinction, they are and have been entitled to protection such as that afforded by Section 258, a "police regulation, the sanction of which lay in the constitutional power of the State and not in contract." *Abie State Bank* v. *Bryan*, 282 U. S. 765, 782.

Defendant in the Appellate Division (p. 51) took us to task for not specifying the safeguards which the State had erected about savings banks and for our failure to refer to any safeguards surrounding savings and loan associations. This we deemed unnecessary, for even Special Term had realized that such safeguards had been erected as to savings banks and so stated, before it fell into error (R. 664). New York savings banks do not make commercial loans. They do not accept demand deposits. If greater detail be needed, the Court is respectfully referred to the provisions of Articles VI and X of the New York Banking Law, dealing with savings banks and savings and loan associations, respectively.

Significant in this respect was the defendant's unguarded confession in the Court of Appeals that national banks, unlike New York savings banks, are unrestricted by state law as to the "amount which may be received from particular depositors, the corporate or individual nature of the depositor, the manner of withdrawal" (Deft's Court of Appeals Brief, p. 19), or in respect of other safeguards designed to protect savings bank depositors in New York. More amazing is the virtue which the appellant now (Br. pp. 78-79) makes of the fact that the funds it obtains by passbook deposits may be used for commercial and personal loans.

Our statute is completely non-discriminatory *vis-a-vis* federal banking institutions. Its restriction is directed against national banks no more than it is directed against other "non-savings banks." And its exception in favor of "savings and loan" associations extends, without qualification, in favor of federal as well as state associations of that type.

We did not believe that the defendant would continue to argue that a national bank, a type of stock corporation, should be given any special privilege to mislead or confuse the public into believing that it is a bank organized as a savings bank under Article 6 of the New York Banking Law. Such an argument is particularly inappropriate in the light of the fact that the National Banking Act contains a provision, similar to that contained in Section 258, prohibiting the use by banks other than national banks of the words "national," "Federal," or the words "United States," separately or in combination with other words, except by institutions organized under the laws of the United States (12 U. S. C. A., §§ 583-4); and a prohibition exists against false advertising or representation as to membership in the federal reserve system (12 U. S. C. A., § 586).

At least in the absence of explicit contrary action by Congress, New York would seem to have the same right as the federal government to protect its citizens from misleading advertising.

POINT II

National banks may not disregard a State's standard of honest business dealing.

The New York Court of Appeals did not dispute the paramount power of Congress to regulate national banks and the supreme role of Federal laws enacted in that field. But it noted that (R. 686):

> "• • • national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not inter-

fere with the functioning of the banks, and which do not contravene Federal laws."

In support of these principles, it cited (R. 686-687):

First Nat. Bank v. *California,* 262 U. S. 366, 368;
Burnes Nat. Bank v. *Duncan,* 265 U. S. 17;
Lewis v. *Fidelity Co.,* 292 U. S. 559, 566;
Seabury v. *Green,* 294 U. S. 165, 169;
Jennings v. *U. S. F. & Co.,* 294 U. S. 216;
Anderson Nat. Bank v. *Luckett,* 321 U. S. 233;
Roth v. *Delano,* 338 U. S. 226, 230;
Standard Oil Co. v. *New Jersey,* 341 U. S. 428, 441;
Lauer v. *Bayside Nat. Bank,* 244 App. Div. 601;
Matter of Baldwinsville Fed. Sav. & Loan Assn. [Van Wie], 268 App. Div. 414, 422, 423;
Clark v. *First Nat. Bank of Morrisville,* 130 Misc. 352, 354;
United States Pipe & Foundry Co. v. *City of Hornell,* 146 Misc. 812, 815;
Matter of Keene, 152 Misc. 424, 425;
7 Michie on Banks and Banking, ch. 15, §§ 3, 4, 5.

See also:

Waite v. *Dowley,* 94 U. S. 527, 533;
National Bank v. *Commonwealth,* 9 Wall. 353;
Farmers and Merchants Bank v. *Federal Reserve Bank,* 262 U. S. 649;
Middletown Trust Co. v. *Middletown National Bank,* 110 Conn. 13, 147 Atl. 22;
State v. *People's National Bank,* 75 N. H. 27, 70 Atl. 542.

In *McClellan* v. *Chipman,* 164 U. S. 347, a Massachusetts statute against *fraudulent transfers* was held to apply to national banks. In the *McClellan* case, Justice WHITE wrote (164 U. S., 359):

"As long since settled in the cases already referred to, the purpose and object of Congress in enacting the

national bank law was to leave such banks as to their contracts in general under the operation of the state law, *and thereby invest them as Federal agents with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.*" (Italics supplied.)

should be noted that as early as the *McClellan* case, this ourt unanimously declined to give to state legislation "a rained and unreasonable construction" in order to find conflict between the state and federal legislation (pp. 9-360).

On the subject of the alleged conflict between the Massausetts statute and the National Banking Act provisions titling national banks to take real property in satisfacon of an antecedent debt, this Court, first referring to e authority of the National Bank Act, wrote (p. 358):

"The argument is that as this statute permits national banks to take real estate for given purposes, therefore the Massachusetts law which forbids a transfer of property, with a view to a preference, in case of insolvency, where the transferee has reasonable cause to believe that the transferrer is insolvent or in contemplation of insolvency, in no way controls the contracts or dealings of a national bank. But this position denies the general rule just referred to, and amounts to asserting that in every case where a national bank is empowered to make a contract, such contract is not subject to the state law. *In the case in hand there is no express conflict* between the grant of power by the United States to the bank to take real estate for previous debts, and the provisions of

the Massachusetts law, which, although allowing as a general rule the taking of real estate, as a security for an antecedent debt, provides that it cannot be done under particular and exceptional circumstances. *Nor is there anything in the statutes of the State of Massachusetts, here considered, which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the State are subjected,* one of which limitations arises from the provisions of the state law which in case of insolvency seeks to forbid preferences betwen creditors." (Italics supplied.)[40]

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[40] The contracts of national banks, unless *ultra vires* under the federal statutes, have been held to be governed by state law. *National Bank* v. *Commonwealth,* 9 Wall. 353, 362. Both state common law and statutory law may apply. *Nakdimen* v. *First Nat. Bk. of Fort Smith,* 117 Ark. 303, 6 S. W. 2d 505, cert. den. 278 U. S. 635; *Jennings* v. *U. S. F. & G. Co.,* 294 U. S. 216, 219; *Dakin* v. *Bayly,* 290 U .S. 143; *Matter of Hickmott,* 256 App. Div. 1047

The liability of national banks in torts has also been governed by local law. *National Bank* v. *Graham,* 100 U. S. 699 (negligence in custody of bonds for safekeeping); *First National Bank of Grand Forks* v. *Anderson,* 172 U .S. 573 (conversion of notes). Note particularly *Singleton* v. *Harriman,* 152 Misc. 323, aff'd 241 App. Div. 857 where, under New York law, the Harriman National Bank was held liable, in damages, for its officer's *misrepresentations* in the sale of stock; and *Pronger* v. *Old National Bank,* 20 Wash. 618, 56 Pac. 391 where a national bank was held liable, despite an *ultra vires* defense, for it officers' *fraud* in sale of promissory notes; and see 35 Col. L. Rev. 416, 418n.

So, too, criminal laws of the States have been applied to national banks and their officers. See *Cross* v. *North Carolina,* 132 U. S. 131, where a statute prohibiting forgery was held applicable to the president and cashier of a national bank. *Easton* v. *Iowa,* 188 U. S. 220, 238-9, would appear to be distinguishable on the ground that the penal statute there involved tended to interfere with federal super-

(*Continued on following page*)

may be that where, as here, Congress has not legis-
d on the subject, State legislation will be sustained
ess it impairs the efficiency of national banks in the
harge of their *governmental functions. Farmers and*
hanics National Bank v. *Dearing,* 91 U. S. 29; *Davis*
lmira Savings Bank, 161 U. S. 275, 283; *First National*
k of San Jose v. *California,* 262 U. S. 366, 368; *First*
ional Bank v. *Missouri,* 263 U. S. 640. See also *Emer.*
t Corp. v. *West. Union,* 275 U. S. 415, 416, 425-426;
National Labor Relations Board v. *Bank of America,*
130 F. 2d 624, 626-627, cert. den. 318 U. S. 791, indi-
ng the essentially private and non-governmental char-
r of national banks, even though they may be occa-
ally and incidentally called upon by the government to
in carrying out its fiscal policies.

here would appear to be no doubt, however, that a State
d, without impairing the efficiency of a national bank
e performance of its governmental or ordinary bank-
unctions, compel it to live up to the ordinary standards
onesty and fair dealing required of others in the busi-
community, even though some pecuniary disadvantage
result from such adherence to local standards.
lellan v. *Chipman,* 164 U. S. 347; *Middletown Trust*
. Middletown National Bank, 110 Conn. 13, 147 Atl.
See also *Comanche* v. *Johnston,* 170 Okl. 515, 41 P. 2d

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inued from preceding page)

lence of insolvent national banks, a subject *expressly* covered
e National Banking Act. Note that even in a national bank's
ership, this rule has been relaxed to give effect to state law.
oth v. *Delano,* 338 U. S. 26.

the absence of any clear prohibition in the National Banking
his Court has sustained the right of a stockholder under the
on law of the State to inspect the stock books of a national
It has refused to hold that inspection was barred by the pro-
of the National Banking Act exempting national banks from
visitorial powers other than" those authorized by the Act or
in courts of justice. *Guthrie* v. *Harkness,* 199 U. S. 148.

115; *Schramm* v. *Bank of California,* 143 Ore. 546, 578, 20 P. 2d 1093, 1103-4.

We shall show (*infra,* pp. 104-113), how even in the field of taxation of national banks by the states, there has been a distinct trend away from the absolute tendency to immunize "federal instrumentalities from state legislation." It would seem utterly inconsistent, therefore, to swing in the opposite direction, as Special Term did, in connection with a law relating to a simple standard of honesty and fair business dealing.

In *Anderson National Bank* v. *Luckett,* 321 U. S. 233, a statute directing payment to the State of Kentucky of presumptively abandoned accounts of national and state banks was held not to interfere unconstitutionally with a national bank as an instrumentality of the federal government. Chief Justice STONE wrote (pp. 247-248):

> "We come now to appellant's second contention, that the Kentucky statute infringes the national banking laws and unconstitutionally interferes with appellant as an instrumentality of the federal government. Both the statute does not discriminate against national banks, cf. *McCulloch* v. *Maryland,* 4 Wheat, 316, by directing payment to the state by state and national banks alike of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes. Cf. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275."

Chief Justice STONE continued (p. 248):

> "This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions.

Waite v. *Dowley,* 94 U. S. 527, 533; *First National Bank* v. *Missouri,* 263 U. S. 640, 656; *Lewis* v. *Fidelity Co.,* 292 U. S. 559, 566; *Jennings* v. *U. S. Fidelity & Guaranty Co.,* 294 U. S. 216, 219. Thus the mere fact that the depositor's account is in a national bank does not render it immune to attachment by the creditors of the depositor, as authorized by state law. Compare *Earle* v. *Pennsylvania,* 178 U. S. 449, with *Van Reed* v. *People's National Bank,* 198 U. S. 554.

e further noted (pp. 248-249):

"For an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business."

ıstice STONE concluded (pp. 252-253):

"Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs. *Waite* v. *Dowley, supra; Colorado Bank* v. *Bedford,* 310 U. S. 41, 53."

Equally significant is this Court's holding that there s nothing unequal or discriminatory about a state v relating to abandoned property which made it apcable only to abandoned property in a savings bank. *ovident Savings Institution* v. *Malone,* 221 U. S. 660. at statute directed toward savings banks, alone, was held as constitutional. See also *Roth* v. *Delano,* 338 S. 226, permitting the state to assert its escheat power en in a national bank receivership, provided there was

no interference with the federal function of orderly liquidation and no conflict with federal law. See, too, *Conn. Mut. Life* v. *Moore*, 333 U. S. 541.

In *Lewis* v. *Fidelity Co.*, 292 U. S. 559, which dealt with the type of security that a national bank might give as the security for the deposit with it of the funds of a state or a political subdivision thereof, pursuant to the Act of 1930, Ch. 604 (12 U. S. C. A., § 90), it was held that the main purpose of the 1939 Act was to equalize the *powers* of state and national banks, by giving the national banks the *power* to furnish the same type of security the state banks furnished for those deposits.

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[41] The *Lewis* case was followed in *Matter of Baldwinsville Fed. Sav. & Loan Assn.*, 268 App. Div. 414, and in *Lauer* v. *Bayside National Bank*, 244 App. Div. 601. In the *Lauer* case, however, the Court held the provision of section 10 of the Stock Corporation Law, relating to the right of stockholders to inspect the stock books of a corporation to be inapplicable to national banks since it found that the National Banking Act (12 U. S. C. A., § 62) had covered the subject of such inspection. The federal statute contained no provision for a penalty for non-production of such books, but the New York statute did. The Court found that this difference constituted a "conflict"; and upon the assumption that a federal legislation covered the field of "inspection" of the records of a national bank, refused to enforce the State provision for a penalty. But see the same Court's decision in *Matter of Schwamm* v. *United National Bank of Long Island*, 269 App. Div. 692, permitting inspection of national bank stock lists; and compare *People, etc.* v. *Coast Federal Sav. & Loan Ass'n*, 98 F. Supp. 311, involving a federal *savings and loan association*, for whose regulation, it was held, Congress had made *complete* provision by legislation, to "embrace the entire field"; and as to which comprehensive rules and regulations had been promulgated, pursuant to *Act of Congress*.

POINT III

**Congress has not authorized national banks to vio-
te state standards of fair competition by using the
ords "saving" or "savings" in advertising the per-
rmance of their functions as national banks. Nor
s Congress authorized national banks in any other
ay to masquerade as State-organized "savings
nks."**

No Act of Congress authorizes national banks to parade
state-organized savings banks or to assume an identity
ner than that of a national bank. Likewise, no federal
gislation specifically authorizes national banks to use
y words, phrases or terminology in their national bank-
g business which would contravene state prohibitions
ainst misleading advertising. Most significant, however,
the absence of any federal legislation authorizing
tional banks to use the terms "saving" or "savings"
their advertising or otherwise in their business.

Contrast Congressional action when, in dealing with the
ganization of federal savings and loan associations, it
pressly authorized the organization and incorporation
associations to be known as "Federal Savings and
an Associations" (12 U. S. C. A., § 1464). The express
d specific provisions of the Federal Home Loan Act
verning federal savings and loan associations were
e basis of the Massachusetts decision in *Springfield Inst.
r Savings* v. *Worcester F. S. & L. Assn.*, 329 Mass. 124,
7 N. E. 2d 315, cert. den. 344 U. S. 884, upon which
e appellant so strongly relied below (Def'ts Ct. of Ap-
als Brief, pp. 16, 33, 34, 41, 42, 74; cited here at footnote,
51).

More pertinent here than the *Springfield* case is the
rlier Massachusetts case of *Commonwealth* v. *McHugh*,
6 Mass. 249 (1950), where the restraints of the State's

anti-monopoly law were held *not* to have been rendered unenforceable by the enactment of the Sherman Act by the federal government. Although the Court was dealing with a question of interstate commerce, where it conceded that federal law would prevail "If there should be a conflict between the State law and the federal law," the Court warned, in language which is appropriate here (pp. 265-266).

> "A State Court should be throughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the State, lest it discover later that it has retreated where the Federal goverenment will not advance and has therefore been derelict in its duty. We should be assuming a heavy responsibility if we were to take the position that the great existing mass of State legislation to which we have referred is, and ever since 1890 has been, so limited in practical usefulness."

It should be noted that although Congress acted in 1951 to remove the favored income tax-exempt status its own tax policies had granted to savings banks and savings and loan associations (Revenue Act of 1951, § 313), it has not acted to remove the protection afforded to potential depositors in mutual, non-stock, institutions by a statute like section 258, subd. 1, of the Banking Law. We do not believe that Congress will act to do so, without weighing the possibilities of public deception against the minor disadvantage to national banks of using non-misleading substitutes for the words "saving" and "savings" in their advertising.

(1)

On the contrary, many significant provisions of the National Bank Act (12 U. S. C. A., ch. 2, §§ 21-213) indicate firm determination upon the part of Congress to have national banks exercise their federally-granted powers in the States in which they are located in a manner which will not conflict with the standards which govern state-chartered banks.

The intention of Congress to place national banks generally on a basis of simple equality with competitive state institutions was recognized in *Lewis* v. *Fidelity & Deposit Co. of Maryland,* 292 U. S. 559, 564-5. Where Congress has intended to confer exceptional powers on federal banks to enable them to compete more effectively, it has *expressly* done so. See *Missouri ex rel. Burnes National Bank* v. *Duncan,* 265 U. S. 17; and *First National Bank* v. *Fellows,* 244 U. S. 416, relating to the power of a national bank to act as a fiduciary.

Examples of the Congressional policy *not* to deviate from state standards of conduct may be found in various provisions of the National Bank Act:

1. National banks are authorized to establish and operate new branches "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question" (12 U. S. C. A., § 36, subd.). Such a provision, of course, indicates a purpose to place national and state banking systems upon an equal competitive plane. *Rushton, etc.* v. *Michigan Nat. Bank,* 8 Mich. 417, 299 N. W. 129, 136 A. L. R. 458.

2. A national bank is empowered to make contributions charitable instrumentalities only "if it is located in a ate the laws of which do not expressly prohibit State nking institutions from contributing to such funds or strumentalities" (12 U. S. C. A., § 24; paragraph Eighth").

3. National banks are authorized to transact their "general business" only in the place specified in its organization certificate; and for jurisdictional purposes, are deemed to be citizens of the state in which they are located (12 U. S. C. A., § 81). *National Bank* v. *Phoenix Warehousing Co.*, 6 Hun 71; *Starr* v. *Schram*, 143 F. 2d 561.

4. The rate of interest which a national bank may charge is limited to "interest at the rate allowed by the laws of the State where the bank is located," subject to a specified exception (12 U. S. C. A., § 85). In construing the effect of this provision, it was held in *Union Nat. Bank* v. *Louisville, etc. R. Co.*, 163 U. S. 325, that while the right of a national bank sprang from an Act of Congress, it was (p. 331):

> "only a right to have an equal administration of the rule established by the state law."

In the *Union National Bank* case, the Court further held that such right (p. 331):

> "does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law; only the right to see that such rule is equally enforced in favor of national banks."

5. National banks are authorized, upon the deposit with them of public moneys of a State or political subdivision thereof, to give security for the safekeeping and prompt payment thereof, only "of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the State." *Loughman* v. *Town of Pelham*, 126 F. 2d 714; 12 U. S. C. A., § 90.

6. Actions by a receiver of a national bank for stock assessments and to recover debts owed to the bank are

governed by the law of the state in which the bank is located. *Tobin* v. *Hymers,* 99 F. 2d 740; *Nagle* v. *Herold,* 30 F. Supp. 905; 12 U. S. C. A., § 192. A similar rule exists as to actions against receivers of national banks. *First Trust & Savings Bank of Oneida* v. *Kent,* 119 F. 2d 151, cert. den. 314 U. S. 648. Receivership dividends to creditors of a national bank are, of course, distributable pursuant to federal statute. 12 U. S. C. A., § 194.

7. In matters relating to taxation, Congress has enacted an express and specific prohibition against a particular type of discrimination prohibiting the various states from taxing national bank shares at a rate higher than that imposed by the states on "other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." R. S. § 5219; 12 U. S. C. A., § 548. *Tradesmens National Bank* v. *Tax Comm.,* 309 U. S. 560; *First National Bank* v. *Hartford,* 273 U. S. 548.

Congressional policy has been to equip national banks with the power *fairly* to meet competition arising in the various states. In some matters Congress has specifically endowed national banks with special powers. But Congress has nowhere indicated any policy to permit national banks to compete *unfairly.* It has not sanctioned *unfair* competition by national banks.

(2)

Section 24 of the Federal Reserve Act (12 U. S. C. A., § 371), relied on by the defendant as the statutory basis for their claim of impairment of the powers of a federal instrumentality, does not purport to grant to any national bank the power to advertise, using the words "saving" or "savings," or to pass itself off otherwise as a state-organized savings bank.

Special Term, at one part of the trial, recognized (1758):

"The Court: There is nothing in the Federal statute that authorizes the use of these contested

words. The use of those contested words would be by implication only."

The defendant, too, conceded that it had not expressly been given the power to use the contested words (Court of Appeals Brief, p. 17). But it seeks to pile inference upon inference. And after implying the power to advertise, which is not expressly granted, but which we concede, it seeks to imply further the power to advertise in a particular way—by the use of certain words, even though the use of those words is regarded by New York as deceptive when used by other non-mutual savings institutions. But section 24 of the Federal Reserve Act (sometimes referred to below and herein as section 371, by reason of its numbering in 12 U. S. C. A.) does not justify any such double inference.

Section 24 sets forth certain of the powers of national banks and other federal reserve member banks. Listed among these are the powers, and the restrictions thereon, of national banks to lend money on farm lands and improved real estate. The section also continues the power of national banks to "receive time and savings deposits," thereafter as theretofore, and restricts the power of national banks to pay interest thereon to the rate payable by state banks.

Nothing in the phraseology of Section 24 or of any other provision of the Federal Reserve Act, or of the National Bank Act, indicates a federal purpose to empower national banks to solicit or receive savings deposits by means of misleading representations or advertising. Whether "savings" deposits be deemed to be simply a type of "time deposit" (as defined by the Federal Reserve Board pursuant to section 19 of the Federal Reserve Act, 12 U. S. C. A., § 461) or a type of deposit, independent in character from "time deposits", the pertinent Congressional provisions simply do not authorize national banks to advertise their power to *receive* such deposits in language which is misleading.

Both Section 19 (12 U. S. C. A., § 371b) and Section 24 of the Federal Reserve Act indicate a congressional intent to respect local conditions in the various states. Section 24, just as the National Bank Act does (see 12 U. S. C. A., § 85, *supra*, p. 88), prohibits national banks from paying interest at a higher rate than that permitted to be paid by State law. And Section 19 (12 U. S. C. A., § 371-b) directs the Board of Governors to regulate interest rates payable on time and savings deposits "subject to different conditions by reason of different locations", etc.

(3)

The avowed purpose of Congress, in amending Section 24 of the Federal Reserve Act in 1927, was to extend the power of national banks to make secured loans upon real estate. The clarification in 1927 of the national bank power "hereafter as heretofore" to "receive" savings deposits did not authorize national banks to advertise in a manner theretofore and since regarding as misleading in New York.

Section 24 of the Federal Reserve Act, as originally enacted in 1913, dealt only with the power of national banks to make "Loans on Farm Lands." It permitted such loans only to the extent of 25% of a national bank's capital and surplus *or to one-third of its time deposits.* It also stated that such banks might "continue hereafter as heretofore to receive time deposits and to pay interest on the same" (38 Stat. 273).

In Section 19 of the original Federal Reserve Act "time deposits" were expressly stated to comprise "all deposits payable after thirty days, and all *savings accounts* and certificates of deposits *which are subject to not less than thirty days' notice before payment.*" (38 Stat. 270, italics supplied.) The Act specifically stated that time deposits should be so "construed." (Federal Reserve Act, § 19.)

The amendment in 1927 of section 24 of the Act to state that national banks might continue to receive "time and

savings deposits and to pay interest on the same" was a clarification only of the extent of the power of national banks to "*receive* savings deposits." National banks had been extensively engaged in the business of receiving such pass book evidenced *interest-bearing* deposits. The amendment simply made it clear that national banks could continue to do that sort of business and eliminated any doubt that deposits of that type might be included in the base for computation of the aggregate permissible amount of loans which a national bank might legally make on the security of real estate. Indeed, "savings deposits", *as distinguished from* "time deposits", were made an alternative base for computing the maximum amount of real estate loans which might be made by a national bank (44 Stat. 1232).

The appellant and the Government have completely overlooked the fact, that even when Congress clarified the extent of the power of national banks to receive "savings deposits," that power was stated in terms that restricted national banks to receiving such deposits "hereafter as heretofore." Conformity to the existing *practices of national banks* in the States of their location was indicated as the basis for future national bank practice, rather than uniformity. And in New York, national banks have governed their practices accordingly.

The specification in the 1927 amendment to section 24 of the Federal Reserve Act of the power to receive "savings" deposits, as well as those defined as "time" deposits (which sometimes is defined to include "savings" deposits) merely eliminated doubts as to the power of national banks

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[33] Amendments to section 24 have increased the powers of national banks to make loans secured by real estate, so that the loans are now no longer restricted to farm lands, but also may be made on improved real estate. Limits have been set as to the maximum amount of any individual loan permitted upon such security. And higher limits than originally permitted have been fixed as to the *aggregate* amount of such loans which a national bank may make. (See 12 U. S. C. A., § 371.)

receive "savings" deposits.[34] It did not authorize na-
nal banks to carry on the portion of their business
aling with the receipt of "savings deposits" without
gard to the existing standards of honest business dealing
the States in which they were located.

Congressional reports and discussion of the 1927 amend-
nt contain no affirmative support for the appellant's
sition. On the contrary the House Report (No. 83, 69th
ng., 1st Sess.) sponsoring the National Bank Bill of
27 stated that the general purpose of the bill was to
just national banking laws to modern banking conditions
. 2):

> "along the lines of conservative banking, and without any deviation from the high standard which has been set by the national banking system."

The bill's sponsors stated that it extended national bank
arters for an indefinite term of years, clarified certain of
eir investment powers and enabled them to establish
anch banks.

The sponsors of the bill labeled section 16 of the bill,
nich amended section 24 of the Federal Reserve Act (and
nich included the provision, among others, continuing
nereafter or heretofore" the power to "receive" savings
posits) merely as a

> "restatement of the existing law relating to loans by banks upon the security of real estate,"

nich broadened such powers only "as to the time limit
loans upon city property" while "at the same time" it
ade "restrictions by way of definitions." *The section*
creased from one to five years the length of loans upon
st mortgage which a national bank was empowered to

[34] Even the 1939 opinion of the Comptroller of the Currency upon
nich the appellant and the Government rely so heavily indicates
at the "doubt" existing prior to 1927 concerned the power of na-
nal banks to "receive" deposits of the "savings" type (See page
ur of the Opinion, annexed to the Appellant's Statement of Juris-
ction).

make. The section also limited such loans to an amount not exceeding one-half of the savings type deposits in a national bank. In effect, the sponsors of the bill stated that it had become necessary to recognize:

> "the right of a national bank with certain definite restrictions to use these funds in the same general manner in which the state banks and trust companies are using them, which includes the right to make loans upon city property."

Returning to the general purposes of the 1927 National Bank Bill, its sponsors stated that they sought to give national banks rights to place them "more nearly on a par with state member banks," state member banks meaning, of course, members of the federal reserve system. It is clear from a reading of the entire report that it was not the purpose of Congress by any of the 1927 amendments to empower national banks to engage in a type of advertising which was prohibited, as misleading, even to state banks which were federal reserve bank members.

In the floor discussion of the bill, Chairman McFadden of the Senate Committee sponsoring the bill indicated no purpose to obliterate safeguards which had been erected by any State to protect the identity of its own institutions. Far to the contrary, in the only discussions which concerned even the problem of requiring *segregation* of the different types of deposits receivable by a national bank and their investment, Mr. McFadden indicated that the Committee "did not feel that it was desirable at this time to consider that subject in connection with this bill" (67 Cong. Rec. 2833).[35]

Special Term appears to have been misguided to some extent by the *1915* opinion of counsel to the Federal Re-

[35] In this connection, Senator McFadden mentioned specifically only the California practice of "departmental banking." No reference was made to New York's savings' bank system or to our State's statutes or practices.

e Board, in coming to its conclusion that Section 24 amended to give national banks the power to use the "savings" in its advertising (R. 671). The opinion not with Section 258, but with a California statute, power of California to enforce a *penalty* against a nal bank, and related to a departmental banking situ-.[36] Moreover, Special Term failed to note that the sel to the Treasury conceded that even in the Cali-a departmental banking situation national banks ld not be permitted to "advertise themselves 'as gs banks' since they are not so designated in the Act."

ngressional discussion of the 1927 amendment con-d several colloquial references to the "savings " business which had been conducted by national s; but they need not be attributed any great weight , Congress, neither in its 1927 legislation nor in any equent statute, has seen fit to overcome the objection orth in the 1915 Federal Reserve Board opinion. It ever deemed it proper to designate national banks as ings banks."

Reference to the California statute is misleading. California's e and policy as to savings banks is radically different from New s. Savings banks in California are not even mutual institu-and are not restricted, as are New York savings banks, to sav-deposits. In California all banks appear to be stock corpora-which may do a commercial banking business and receive cer-es to do business as "savings banks." Deering's Cal. Code, 0, 1100 and 3394.

the subject of administrative construction by the Federal rities, the appellant has failed to call to this Court's attention act that the State of California did not accept as correct the retation of Federal Reserve Counsel as to the meaning of Sec-4 of the Federal Reserve Act. Indeed after publication of the al Reserve Counsel's opinion in 1915, the attorney for the rnia Banking Board submitted a brief to the Federal Reserve l indicating a contrary opinion. Paton's Digest (1926 Ed.), , § 637a, p. 1226.

should be noted, too, that this early edition of Paton's Digest, lending support to the appellant's position, cautioned national rs that the propriety of the use of the word "savings" would be positively settled until decided by the court of last resort." 's Digest (1926 Ed.), Vol. 1, § 637, p. 101.

Far greater significance must, we submit, be accorded *the practice of national banks in New York, thereafter as theretofore,* to continue to respect the provisions of section 258 of the New York Banking Law. In any event, Congress may not be deemed to have indicated any intention, in its 1927 legislation, to clarify any doubts existing in the various States as to proper methods of advertising by national banks, since Congress merely continued the power of national banks to "receive" savings deposits "as heretofore."[37]

4. No federal administrative action has been taken which could override the New York substantive law.

Action of the Comptroller of the Currency even in approving the *name* of a bank has been held not to be so conclusive as to justify its use where it would lead to public confusion. In *Middletown Trust Co.* v. *Middletown National Bank,* 110 Conn. 13, 147 Atl. 22, a national bank was enjoined from using a confusing name even though it had previously been approved by the Comptroller of the Currency.

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[37] The national bank practice in New York (Deft's Court of Appeals Br., p. 21, top 2 lines) of continuing to respect the provisions of section 258, also belies the appellant's contention that the purpose of the 1927 amendment to section 24 of the Federal Reserve Act was to enable national banks to use the word "savings" in their advertising. See *Madruga* v. *Superior Court of California,* U. S. , decided January 18, 1954. The *practical construction* by national banks in New York of section 24 is best shown by their non-use of the words in issue.

Appellant's presentation of the case to the Court of Appeals was itself misleading when it sought to have the Court act favorably to it upon the assumption that the "rulings" of the Federal Reserve Board and the Comptroller of the Currency "have been consistently adhered to *and followed for 38 years, with no dissent*" (Deft's Court of Appeals Brief, p. 27). In view of the *actual practical construction of the federal statute by national banks* in New York, cognizant of what had been their prior practices, the 1915 ruling of the Federal Reserve Board and the 1939 Opinion of the Comptroller of the Currency were entitled to little significance.

Moreover, we believe it has been the practice of the Comptroller of the Currency *not* to approve names including the word "savings" for national banks located in *New York*. The Government's brief contains nothing to indicate that we are in error in this regard.

Even if a Federal administrative agency had expressly sanctioned defendant's use of the word "savings", such action would not be controlling upon the New York courts. In *Regents* v. *Carroll*, 338 U. S. 586, the Court sustained a state court judgment for breach of a contract, whose repudiation the Federal Communications Commission required as a condition precedent to the granting of a license by the Georgia Board of Regents to operate a radio station. It held that the judgment of the state court did not contravene the Supremacy clause of Article VI of the Constitution (p. 596). In so holding the Court cited with approval its earlier decision in *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, where the Court had conceded the power of the Nebraska Court to adjudicate conclusively a claim of fraud in the transfer of a radio station. Referring to its decision in the *Radio Station* case, the Court stated (338 U. S. 586, 599-600):

> "In the WOW case, the Commission had not passed upon the question of fraud, but if at the time of the state adjudication there had been a finding by the Commission that the facts did not justify a refusal to transfer the license, this finding would not have affected the right of the state court to determine independently the issue of fraud."

It continued (p. 602):

> "We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others."

So, too, in the instant case, the Federal Reserve Act may not be read to deprive New York of its power to protect its citizens from misleading advertising.

In any event, the Federal Government has not promulgated any regulation which purports to govern the *advertising* of national banks. Federal Reserve regulations "D" and "Q", do not do so. So far as pertinent here, they simply *define* time and savings deposits for certain specific purposes of the Federal Reserve Act.

The defendant appears to have abandoned its reliance upon the recent Circuit Court decision in *United States* v. *Manufacturers Trust Company,* 198 F. 2d 366. The *Manufacturers Trust Company* case dealt with a "special interest" account in a state bank. It held that the government in seeking to collect taxes from a delinquent taxpayer out of funds on deposit in a "special interest" account was not prevented from exerting its rights as a creditor by the provision of Federal Reserve Regulation "Q" prohibiting withdrawals from a passbook account "without presentation of the passbook." The Court wrote (p. 368):

> "* * * the regulations of the Board of Governors of the Federal Reserve Board cannot abrogate the power of the Treasury to enforce the collection of taxes. Cf. 12 U. S. C. A., § 246. And, there is nothing to make reasonable any conclusion that they were so intended."

Likewise, neither Federal Reserve Regulation "D" nor "Q" may abrogate the salutary provisions of Section 258 of the New York Banking Law. Nor do they contain any words to make reasonable any conclusion that they were so intended.

Federal policy to respect New York State's prohibition against the use of the word "savings" by non-savings banks is exhibited, as a matter of fact, in Operating Circular No. 15 of the Federal Reserve System, dated December 8, 1947. This operating circular was offered

in evidence as exhibit "W" by the respondent. Footnote No. 2 of the circular states:

> "Since the use of the word 'saving' and 'savings' are restricted by statute in the State of New York, the term 'thrift deposit' is used to describe deposits conforming to the definition of the term 'savings deposits' in Regulation Q."

The State does not here challenge the general power of the defendant or any other national bank to receive passbook-evidenced interest-bearing time deposits or their implied power to advertise. It seeks, however, to prevent the defendant, as it would any other national or state commercial bank, from using its implied power to advertise in a deceptive fashion—because the use of words "Saving" or "savings" by a bank which is not a "savings bank", as defined by Article 6 of the Banking Law, is likely to deceive and mislead the public.

(4)

The power granted to national banks *to receive "savings deposits"* does not carry with it, by implication, a privilege to use the words "saving" or "savings", in advertising, when such usage has been found by a State Legislature to be misleading. Congress has not clearly manifested any intention to exclude such an exercise of the police power.

(A)

As was clearly stated in *Colorado Bank* v. *Bedford,* 310 U. S. 41, 48:

> "We may assume that national banks possess only the powers conferred by Congress."

The power should not be implied from the provisions of section 24. *First National Bank* v. *Missouri,* 263 U. S. 640; *Yonkers* v. *Downey,* 309 U. S. 590, 597. See also *Board of Comm'rs* v. *U. S.,* 308 U. S. 343, 352.

We argue against *implying* such a power to advertise or solicit deposits *deceptively,* since the State prohibition is directed, without discrimination against State and national banks alike; and particularly in view of the policy displayed by Congress, throughout the National Bank Act and again in the Federal Reserve Act, to respect local law with regard to maximum interest rates, branch banking, charitable contributions and other matters (See *supra* pp. 87-89, esp. *Union Nat. Bank* v. *Louisville,* 163 U. S. 325).

In *First National Bank* v. *Missouri,* 263 U. S. 640, it was held by this Court that the State of Missouri had constitutionally applied to national banks its prohibition against the maintenance of branch banks, Congress not having theretofore expressly granted to national banks the power to establish branch banks.

The Court rejected the argument advanced by the national bank that the establishment of a branch bank was the exercise of an "incidental power" conferred by section 5136 of the Revised Statutes (12 U. S. C. A., § 24). It set forth this principle for determining whether a power might be deemed an "incidental power" of a national bank (p. 659):

> "Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted."

In arriving at its conclusion that the "purpose" for which the national bank had been created was not being interfered with or its efficiency impaired by the Missouri statute, the Court wrote (p. 659):

> "This conclusion would seem to be self-evident but if warrant for it be needed, it sufficiently lies in the

fact that national banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them. If the non-existence of such branches or the absence of power to create them has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken *by Congress* to remedy the omission." (Italics supplied.)

How pertinent that observation is in the instant case!

Tiffany v. *National Bank,* 18 Wall. 409, is not an authority for such an implication of power. The decision in that case depended upon the *express provision* of the National Bank Act which authorized national banks to take, receive, reserve or charge interest on loans (p. 411):

> "• • • at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the Act."

The *Tiffany* case, on the contrary, is simply another judicial recognition of Congressional policy to have national banks conform to and obtain the advantages of the laws in the States in which they are located, in the absence of a Congressional direction to the contrary. Thus, Congressional policy has been to make the determination of whether national bank transactions have been usurious one of State law, but Congress has itself fixed uniform and exclusive *penalties* to be imposed upon national banks

for usurious transactions. *Farmers' etc. Nat. Bank* v. *Deering*, 91 U. S. 29.[38]

The Congressional policy to have State law govern the determination of whether transactions by national banks are usurious (and so contravene state standards of fair business dealing) is particularly well illustrated, for the purposes of this case, by *Citizens' National Bank* v. *Donnell*, 195 U. S. 369, where a national bank was held to have engaged in a usurious transaction by compounding interest in an unlawful manner even though the total interest amounted to less than the maximum rate permitted by the State. Justice HOLMES, for a unanimous Court, wrote (p. 374):

> "Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. *Union National Bank* v. *Louisville, New Albany & Chicago Ry.*, 163 U. S. 325, 331."

(B)

Furthermore, such a power should not be implied from the provisions of section 24 of the Federal Reserve Act, or as an incidental power since the intention of Congress to exclude States from exerting their police power must

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[38] No attempt has been made by New York in this suit to recover against the Bank the penalty provided for in section 258 of the Banking Law.

be clearly manifested.[39] *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611 and cases there cited; *Allen Bradley Local* v. *Board*, 315 U. S. 740, 749, and cases there cited; *People* v. *County Transportation Co.*, 303 N. Y. 391. As was stated in *Maurer* v. *Hamilton* (309 U. S. 598, 614):

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred *unless clearly indicated* by those considerations which are persuasive of the statutory purpose." (Italics supplied.)

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[39] Nor is there any such clear manifestation in the provisions of the statute governing the Federal Deposit Insurance Corporation (12 U. S. C. A., § 1811 *et seq.*). On the contrary, Special Term, when it referred to federal deposit insurance (R. 670), failed to note that very specific provisions governing that Insurance Corporation indicate a purpose to continue to recognize State-established distinctions between different types of banking institutions rather than to divest mutual savings banks and other savings banks of their identity (§§ 1813, f and g).

Before the Appellate Division, defendant's argument became the rather cynical one that legislation designed to protect a potential depositor from being misled in the exercise of a choice of a bank no longer served a useful purpose; and that it did not matter whether banking institutions resorted to *deception* in their solicitation or advertising since the depositors now have some insurance protection against loss in the event of bank failure. We believe this argument is not only cynical but unsound. Federal deposit insurance was not designed to obliterate the distinctions between various types of banks, insured or uninsured, nor was it designed to encourage *deception in the procurement of deposits*. Furthermore, we do not believe that the Federal Government by providing federal deposit insurance intended to wipe out the dual banking system (state and national) which has so long endured in this country; or that any Court giving the matter mature consideration will conclude that the deposit insurance corporation should be regarded as a substitute for statutory safeguards against banking misconduct.

Moreover, federal deposit insurance is made available by a deposit insurance corporation rather than by the Government itself. The assets of the Treasury are not generally available to meet the insurance contracts of the deposit insurance corporation. The annual

(*Continued on following page*)

POINT IV

Section 258, which is non-discriminatory, since it applies to State-chartered banks as well as to national banks, is constitutional. It does not violate the supremacy clause of the Federal Constitution.

(1)

The decision at Special Term amounted to an extension of the doctrine of *McCulloch* v. *Maryland*, 4 Wheat. 316, to defeat a proper exercise of New York's police power. Such an extension of the *McCulloch* v. *Maryland* doctrine completely ignored this Court's retreat from the absolute statements of the *McCulloch* case even in the field of its origin—State taxation of federal instrumentalities.

In *Oklahoma Tax Comm.* v. *Texas Co.*, 336 U. S. 342, this Court unanimously held that a lessee of mineral rights in allotted and restricted Indian lands in Oklahoma had no immunity under the Federal Constitution from non-discriminatory state gross production taxes and state excise taxes on petroleum produced from such lands, Justice Rutledge said (p. 352):

"It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its for-

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(*Continued from preceding page*)

report of the Federal Deposit Insurance Corporation, for the year ended December 31, 1951, showed at that time total assets of $1,360,345,176.10 for the corporation as against total liabilities of $78,157,227.72, leaving available a deposit insurance fund of $1,282,187,948.38 to insure deposits. Insured deposits totaled $92,531,000,000 as of September 19, 1951. It should be noted too, that the total deposits in all insured banks in the United States, as of September 19, 1951, amounted to $170,499,000,000. It is thus obvious that a substantial portion of deposits even in insured banks is not covered by federal deposit insurance. Our own record on appeal shows that the defendant maintained even among its so-called "savings accounts," deposits in excess of the $10,000 amount insured by the federal corporation (R. 37).

merly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.

"Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point, together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge. Moreover, even though the immediate questions are closely related to federal policies concerning Indian lands, they are equally tangent to considerations affecting other types of situations raising questions of immunity."

In *New York* v. *United States,* 326 U. S. 572, where ıe tax sustained was a non-discriminatory federal tax ıposed on mineral waters, from which the State of New ork sought immunity, Justice Frankfurter wrote (p. 81):

"In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity."

In *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, the upreme Court held that the salary of an employee of the ederal Home Owner's Loan Corporation, a federal instru-ıentality, was constitutionally subject to non-discrimina-ory taxation by the State of New York, in which the mployee resided.

Reexamination of the immunity concept set forth in *McCulloch* v. *Maryland* had been commenced at least as early as *Helvering* v. *Gerhardt,* 304 U. S. 405, where this Court held that the salary of an employee of the Port of New York Authority was *not immune* from federal taxation. Justice Stone there noted (p. 411):

> "The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an *implied* limitation stems from *McCulloch* v. *Maryland,* 4 Wheat. 316, in which it was held that a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, *implied* as an incident to the borrowing, taxing, war and other powers specifically granted to the national government by Article I, § 8 of the Constitution." (Italics supplied.)

Analyzing the decision in the *McCulloch* case, Justice Stone observed (p. 413):

> "It was perhaps enough to have supported the conclusion that the tax was invalid, that it was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress of a national power. Such discrimination was later recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities. *Miller* v. *Milwaukee,* 272 U. S. 713; cf. *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480, 493."

Turning from a discussion of the *McCulloch* doctrine to the corollary doctrine expounded in *Collector* v. *Day,* 11 Wall. 113, that *state* instrumentalities were immune

om *federal* taxation, Justice Stone further remarked (p. 5):

"It is enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector* v. *Day, supra,* was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state 'could long preserve its existence'."

stice Stone then went on to set forth "cogent reasons y any constitutional restriction upon the taxing power anted to Congress, so far as it can be properly raised implication, should be narrowly limited" 304, U. S. 5, 416).

As a basis for the decision denying immunity from taxan, Justice STONE wrote (pp. 421-422):

"The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end *it is not ordinarily necessary to confer* on the state *a competitive advantage over private persons in carrying on the operations of its government.* There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage." (Italics supplied.)

So, in the instant case, it is not essential to the preservation of the national government that national banks given a competitive advantage over state commercial nks and trust companies—a privilege of using words their advertising which the State has found likely to ve deceptive and misleading. That is an unfair "comitive advantage" which, we submit, the federal constitution does not guarantee to national banks.

The recent trend has been to *restrict* immunity from taxation as the foregoing cases demonstrate. *McCulloch* v. *Maryland* may, therefore, not be relied upon, as it was by Special Term, as an absolutely unrestricted doctrine. This Court, of course, will not *completely overlook* the cases it decided in the period from *Helvering* v. *Gerhardt* (304 U. S. 405) to *Esso Standard Oil Co.* v. *Evans* (345 U. S. 495).

This trend against implication of immunity has not been interrupted by the decisions in *Pitman* v. *H. O. L. C.*, 308 U. S. 21; *Maricopa Co.* v. *Valley National Bank*, 318 U. S. 357, or in *City of Cleveland* v. *United States*, 323 U. S. 329. In each of those cases, immunity was *expressly* granted by Act of Congress. In the *Pitman* case, Congress had *expressly* provided that H. O. L. C. loans should be exempt from all state or municipal taxes. In the *Maricopa Co.* case, Congress had specifically withdrawn the privileges of taxing national bank stock held by the Reconstruction Finance Corp. and in the *City of Cleveland* case, the statute had specifically exempted from taxation property of the Federal Public Housing Authority. Moreover, the Court's very recent decision in *Kern-Limerick, Inc.* v. *Scurlock*, —— U. S. ——, decided February 8, 1954, depended upon a determination that the persons taxed by Arkansas were empowered, under the Armed Services Procurement Act of 1947, to act and had acted in making the purchase taxed, upon a Navy Department "purchase order," as Government purchasing agents, which led the majority of this Court to hold that the *purchaser* had been the *Government itself.*

(2)

This reluctance to extend the doctrine of governmental immunity has been evidenced in this Court's decisions in the field of *regulation,* as well as taxation. This reluctance was noted by Chief Justice STONE in *Penn Dairies* v.

ilk Control Comm., 318 U. S. 261. He said (p. 271):

> "Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U. S. 81, and cases cited; *Colorado Bank* v. *Bedford*, 310 U. S. 41, 53, and cases cited; cf. *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209."

n the Penn Dairies case, it was held that the minimum rice regulations of the Pennsylvania Milk Control Law ould constitutionally be applied to the sale of milk by a ealer to the United States Government. The Court rote (p. 278):

> "We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity."

n arriving at its decision, the Court specifically called ttention to the trend of its decisions not to extend gov-rnmental immunity from state taxation *and regulation* 318 U. S. 261, 270):

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents."

(3)

In the determination of what constitutes an unconstitutional "burden" on the national government, this Court has recognized that the coexistence of state and national governments necessarily imposes some burdens on the national government of the same kind as those imposed on citizens within the State's borders. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523-4; *Penn Dairies* v. *Milk Control Comm.*, 318 U. S. 261, 270-271. We deem worthy of quotation Justice STONE's statement on the subject in the *Penn Dairies* case (pp. 270-271):

"We have recognized that the Constitution presupposes the continued existence of the state's functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy* v. *Mitchell, supra*, 523-24. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 483, 487."

In the related task of determining what might constitute an unconstitutional "burden" on interstate commerce, this

Court, dealing with the validity of the Blue Sky Law of the State of Michigan, had occasion to state, in *Merrick* v. *Halsey & Co.*, U. S. 568, in discussing the burdens of the Michigan statute (p. 587):

> "It burdens honest business, it is true, but burdens it only that under its form dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby caused and inconvenience, but to arrest the power of the State by such considerations would make it impotent to discharge its function. It costs something to be governed."

In sustaining the Blue Sky Law of Michigan, this Court did not hesitate to rely upon its earlier decision in *Engel* v. *O'Malley,* relating to the business of banking. It stated (p. 588):

> "*Engel* v. *O'Malley,* 219 U. S. 128, was not decided because fraud was incidental to the business of banking by individuals or partnerships but because fraud could be practiced in it and that hence it could be licensed."

In dealing with the argument in *Hall* v. *Geiger Jones,* 242 U. S. 539, that the Blue Sky Law of the State of Ohio was an unconstitutional burden on interstate commerce, this Court held that the statute was a valid police power regulation, which affected interstate commerce "only incidentally" (p. 558) and, in so holding stated (p. 557):

> "There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation but it may imply permission of such legislation. In other words, *the burden of the legislation,* if it be a burden, *may be indirect and valid in the absence of the assertion of the national power.*" (Italics supplied.)

This Court noted that the mere "inconvenience" caused by the regulatory legislation was insufficient to warrant a holding of unconstitutionality. Such "inconvenience", it held "must yield to the public welfare" (242 U. S., at p. 552). We may note, parenthetically, that laws designed to prevent fraud have been sustained, not only when they cause *inconvenience,* but even where they interfere with freedom of contract (*McLean* v. *Arkansas,* 211 U. S. 539, 550).

In *Colorado Bank* v. *Bedford,* 310 U. S. 41, this Court held valid a Colorado statute laying a percentage tax on the users of the safe deposit services of banks even though the statute required national banks, among others, to collect and remit such taxes to the State. The Court sustained both the tax on the bank's customers and the requirement that the bank collect and remit the tax as not imposing an unconstitutional burden on a federal instrumentality.

See *National Bank* v. *Commonwealth,* 9 Wall. 353. See also *Des Moines Bank* v. *Fairweather,* 263 U. S. 103, 111, cited in Justice REED's opinion (310 U. S., pp. 51, 53). And see, particularly, *Abilene Nat'l Bank* v. *Dolley,* 228 U. S. 1, where it was held that police power measures taken to make state banks popular and safe were not unconstitutional as to national banks, even though they made the competitive situation of national banks more difficult. Mr. Justice Holmes further stated, as to national banks (228 U. S., at p. 4):

> "They cannot retain the advantages of their adverse situation and share those of the parties with whom they contend. The statutes of the United States when they do not attempt to prohibit competition with national banks do not forbid competitors to succeed."

In *Tradesmens National Bank* v. *Tax Comm.,* 309 U. S. 560, it was held that Congress might constitutionally auth-

prize State taxation of the franchises of national banking associations. It sustained an Oklahoma tax on the net income of national banks, the measure of which included dividends on Federal Reserve bank stock and interest on tax-exempt federal securities. Without dissent, Justice MURPHY wrote for the Court (309 U. S. 560, 567):

> "A consideration of the course of judicial decision on R. S. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which *discriminate* in practical operation against national banking associations or their shareholders as a class." (Italics supplied.)

On the subject of "discrimination", Justice MURPHY wrote (p. 568):

> "Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations. Compare *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373, at 393; *Lionberger* v. *Rouse,* 9 Wall. 468."

See also:

First Nat. Bank v. *Tax Comm'n,* 289 U. S. 60, 64.

(4)

Cases which we have already discussed have indicated that the Supremacy Clause of the Constitution does not require the invalidation of State legislation unless it conflicts directly with the letter or policy of Congressional legislation. Accordingly, we shall here rely chiefly on a leading case applying the Supremacy doctrine.

In *Savage* v. *Jones,* 225 U. S. 501, Justice HUGHES for a unanimous Court, wrote (p. 524):

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food."

Justice HUGHES continued (p. 525):

> "* * * when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

Then he quoted from the opinion in *Plumley* v. *Mass.* (155 U. S. 461, 468, 472):

> "Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? * * *
>
> "Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circum-

stance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States."

till further he stated (225 U. S. 501, 533-4):

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration. *Chicago &c. Ry. Co.* v. *Solan*, 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613; *Reid* v. *Colorado*, 187 U. S. 137; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; *Crossman* v. *Lurman*, 192 U. S. 189; *Asbell* v. *Kansas*, 209 U. S. 251; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 379; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 442."

ee also *Quaker Oats Co.* v. *City of New York*, 295 N. Y. 27, aff'd 331 U. S. 787, and the recent cases in the field f emergency rent control, such as *Matter of Tartaglia* v. *cLaughlin*, 297 N. Y. 419, 425; cf. *Teeval Co.* v. *Stern*, 01 N. Y. 346, 361, 365, cert. den. 340 U. S. 876.

uthorities Relied on By Special erm Distinguished.

Special Term laid great emphasis upon the holding in *cCulloch* v. *Maryland* (4 Wheat. 316). In an earlier ortion of this point we have shown how the apparently bsolute doctrine of the *McCulloch* case has been departed rom even in the field in which it originated—the field of axation of federal instrumentalities. We submit that this ourt's most recent decisions indicate that the *McCulloch*

doctrine does not prevent the States from exercising thei regulatory functions under the police power except wher State action conflicts directly with federal legislatio governing the same subject or interferes with a federal i strumentality in the performance of its public function

First National Bank v. *Union Trust Co.* (244 U. S. 41 simply held that Congress could in the proper exercis of its judgment grant to national banks the right to a as "trustee, executor, administrator or registrar of stoc and bonds" under such rules and regulations as the Feder Reserve Board might prescribe. It will be noted that t Act of Congress creating this power gave to the Feder Reserve Board authority to grant national banks the rig to act in these various fiduciary capacities by special pe mit "when not in contravention of State or local law (244 U. S. 421). But, while recognizing that Congress ha the power to confer upon national banks certain functio of a private nature, the Court nevertheless stated (p. 426

> "Of course as the general subject of regulating t character of business just referred to is peculiar within state administrative control, state regulatio for the conduct of such business, if not discriminato or so unreasonable as to justify the conclusion th they necessarily would so operate, would be contr ling upon banks chartered by Congress when th came in virtue of authority conferred upon them Congress to exert such particular powers."

In *Fidelity Nat. Bank and Trust Co.* v. *Enright* (2 Fed. 236) a district court judge held that a national ba which had originally been a trust company organiz under the laws of the State of Missouri under the na Fidelity Trust Company was entitled to use the na Fidelity National Bank and Trust Company of Kans City, Missouri. This name had been duly approved the Comptroller of the Currency *as required by the N*

tional Banking Act. The Court simply held that the Comptroller of the Currency had been given full power to approve the names of national banks. Cf. *Middletown Trust Co.* case, 110 Conn. 13.

In *Missouri ex rel. Burnes Nat'l Bank* v. *Duncan* (265 U. S. 17), this Court sustained the power of Congress to give to national banks the authority to act in certain fiduciary capacities whether or not trust companies competing with them had that power in the State in which the national bank was located. Justice HOLMES pointed out, quite pertinently, that Congress had "expressed its paramount will" (p. 24).

In *First Nat'l Bank* v. *California* (262 U. S. 366) it was held that an escheat statute of the State of California was void as applied to deposits in national banks. The court held that California could not dissolve contracts of deposits that had been made with national banks even after twenty years and require national banks to pay to California the amounts then due. The evil which the Court sought to avoid was the modification of national banks' valid contracts, with its depositors, by each of the 48 states. The case is clearly distinguishable from the one on appeal where New York's legislation is designed to prevent any bank from obtaining deposits by misleading representations.

In *Easton* v. *Iowa* (188 U. S. 220), the holding was simply that Congress had dealt directly with the insolvency of national banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, with power to suspend the operations of national banks and appoint receivers thereof when they became insolvent or when they failed to make good any impairment of capital. Since Congress had dealt directly with the subject of insolvent banks, the Iowa statute, making illegal certain action by *insolvent* banks or their officers in the State of

Iowa, was held to be inapplicable to national banks. That is not the situation here where Congress has not seen fit to deal with the subject of misleading banking advertising or representations (except to protect federally-chartered institutions) or to contravene State legislation protecting the identity of a certain type of State bank.

Special Term also relied on a statement in Paton's Digest (R. 672). The erroneous premise upon which Paton's Digest (1950 Ed., p. 645), concluded that Section 258 was unenforceable against national banks was that persons intelligent enough "to know the nature of a mutual savings bank" would not make a "deposit in a national bank thinking it was a mutual savings bank." Paton recognized, however, that its position that the word "savings" could be used by national banks was subject to the condition that "the advertising will not lead persons to think that the business is that of a mutual savings bank" (p. 645). New York's Legislature, of course, was entitled to find that use of the word "savings" was likely to be misleading to intelligent, unintelligent or even to ignorant or careless persons.

Conclusion

The distinctive character of the New York *mutual* savings banks has been recognized and respected by this Court. *Mercantile Bank* v. *New York,* 121 U. S. 138. The New York Constitution, Art. X, § 3, requires the Legislature to protect this distinctive character by requiring a uniformity of powers, rights and liabilities for all savings banks and prohibits savings banks from having any capital stock. Section 258 simply seeks to protect persons from being misled into believing that an institution, especially a stock corporation, not possessed of this distinctive character, has it. That has been an objective of the New York Legislature since 1858.

The prohibition contained in Section 258 of the Banking Law against the use of the words "saving" and "savings" is a proper exercise of the police power, designed to prevent public deception and misleading advertising (R. 689). The record warranted the Court of Appeals and Appellate Division's findings (R. 687-690; 679-680) that the defendant's deliberate violation of the statutory prohibition, as conclusively shown by the People's evidence and the defendant's admissions, tended to mislead the public. Clearly, the Legislature did not act unreasonably in prohibiting the use of these words. *Dillingham* v. *McLaughlin*, 264 U. S. 370, 374.

We have been somewhat astonished by the defendant's argument (Ct. Appeals Brief, p. 20; Brief in this Court, p. 37) that since there is no specific prohibition against the misleading use of the word "savings" in the Federal Reserve Act provisions designed to prevent misrepresentation of organizations as banks organized under the laws of the United States (12 U. S. C. A., Sections 583-584), or as members of the Federal Reserve System (12 U. S. C. A., Section 586)[42], that national banks have been given a free hand by Congress to engage in other forms of misleading advertising. We note, additionally, that the federal government has also prohibited advertising calculated to convey the impression that an organization which is not a federal home loan bank, is such an organization (12 U. S. C. A., Section 1441). But we have no doubt that New York, like the Federal Government, is entitled to prevent organizations not organized under certain provisions of its laws from misleading the public into the belief that they have been so organized. *People* v. *Binghamton Trust Co.*, 139 N. Y. 85.

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[42] These provisions are now combined in 18 U. S. C., § 709. The new caption "False advertising or misuse of names to indicate Federal agency" indicates Congress' purpose to be a restricted one, not entering the field of misleading advertising *by* a federal agency.

Congress has not, by section 24 of the Federal Reserve Act (12 U. S. C. A. 371), expressly authorized national banks to use the prohibited words in their advertising or in their dealings with the public. Nor has Congress expressly or by implication given national banks the power to advertise in a misleading fashion. There is no conflict between Section 258 of the New York Banking Law and any federal statute. On the contrary, Congressional policy, as evidenced by various provisions of the National Banking Act, is to conform the conduct of national banks to the business standards of the States of their location, except where it has expressly granted such banks some special privilege. But Congress has nowhere granted national banks any such special privilege to compete unfairly—by misleading advertising. And the federal Constitution contains no guaranty of any special privilege to national banks to deviate from State standards of fair competition.

Special Term's judgment and the reasoning upon which it was based would have left New York powerless to protect its citizens even from deliberately fraudulent and misleading advertising by a national bank; *e.g.*, advertising in which a national bank expressly stated that it was a "savings bank."

New York's Court of Appeals and Appellate Division, on the other hand, have given effect to the New York Legislature's purpose and have molded a decree which prevents the public from being misled by the use of the word "savings," without preventing national banks from competing fairly for deposits, without interfering with the internal operations of any national bank as part of the federal reserve system and without interfering in any way with the performance by national banks of any functions assigned to them by the Treasury in the sale or redemption of savings bonds.

New York's statute is directed against a form of unfair competition. The defendant should not be permitted t

imply from our federal Constitution or from an inexplicit federal statute any right to compete unfairly.

The judgment appealed from should, therefore, be affirmed.

Respectfully submitted,

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Appendix

Art. X, § 3 of the New York State Constitution provides:

> *Savings bank charters; restrictions on trustees; special charters not to be granted.* § 3. The legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. And no such corporation shall have any capital stock, nor shall the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings. The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws. (Formerly § 4 of Art. 8. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

In 1935, a report entitled "Banking Developments in New York State, 1923-1934," prepared by the *New York State Bankers Association* "Commission for the study of the Banking Structure," then in a stage of the business cycle which made it more mindful than now of the hazards involved in having commercial banks encroach upon the functions of savings banks, observed (Chap. V, pp. 67-68):

> *"The Growth of Time Deposits in Commercial Banks.*—The growth in capital assets has been related in a way to the growth in time deposits, which have

now become nearly 60 per cent of total deposits in New York State commercial banks outside New York City. In the struggle of banks for size there has been keen competition for deposits, high interest rates paid on deposits, a rapid expansion of resources, and in many cases a levelling down of the quality of assets. Many institutions have paid out over 50 per cent of their gross earnings in interest on deposits, in a number of years, and the average over a period of years for the commercial banks in this State outside of New York City was over 40 per cent. Not all of these time deposits, of course, are true savings, but represent in part the conversion of slow demand deposits to time deposits. It has been difficult to distinguish sharply between the two types of deposits.

The rates paid on time deposits have frequently been as high or higher than the yields on the highest grade investments. As a result the banks have attracted savings which otherwise would have gone directly into investments or would have reached the borrower through other institutions. These competitive rates for deposits have frequently led banks to acquire loans and investments, without making sufficient allowance for the possibility of losses involved in these assets. In the course of a complete business cycle, therefore, this seemingly profitable business has frequently resulted in great net loss because insufficient reserves have been accumulated to meet the losses which inevitably arise. The predominant business of the so-called commercial banks has come to be that of bringing together the investor, in the guise of a depositor, and the borrower, rather than that of supplying short-term business credits for which there has been little demand. Conditions and developments have been such that many of our commercial banks have taken on something of the nature of investment trusts.

We have seen, however, that in fact and in pract
these time deposits are little different from dema
deposits in times of stress. The real problem wh
faces individual banks and the whole banking syst
is how best to provide protection from a serious decl
in asset values. The difficulty is accentuated by a l
of adjustment between assets of a long-term nat
and liabilities which are payable on demand. T
banks are not only guaranteeing the investment of
public's funds, but they are including in that guar
tee an obligation to convert these investments into c
practically on demand. The banks assume the bur
of any depreciation.

One wonders how the banks in this State mi
have fared during the depression if during the bo
years there had not been the struggle for size,
competition for savings deposits and the high ra
of interest paid to depositors. Other institut
which bring the investor and the borrower toget
have a liability contract with the investor which is v
different from the contract the commercial bank
with its depositors. The problem which arises
whether the commercial bank is a suitable institut
or medium for the investment of this large volume
the public's funds without adjusting its policies
practices to that type of business.

Taking the savings of the people and investing th
is, of course, a social service which the public dema
from its financial institutions. In some communi
the commercial bank is the only available institut
for rendering that service. *It is a question, howe
whether commercial banks have been doing a savi
bank business without following the rules and st
ards essential in that business. The first requisit
supplying that service is to provide fo· the safet

the deposits. All other considerations, including the return to the depositor, are subordinate to that factor of safety.''

The term ''savings bank'' has been defined in an authority (Paton's Digest, 1926 Ed., Vol. 1, Appendix, Definitions of Legal and Banking Terms, p. 37) upon which the appellant places great reliance as follows:

> ''In its general nature, a bank established for the purpose of receiving deposits of money to be invested for the benefit of the persons depositing, rather than of the bank, in mortgages, stocks and bonds, as distinguished from loans and discounts on personal security. Deposits are paid on presentation of passbooks instead of on checks.''